

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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No. 558

FEDERAL POWER COMMISSION, PETITIONER

PANHANDLE EASTERN PIPE LINE COMPANY ET AL

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

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PERMANENT FOR CERTIORARI FILED FEBRUARY 12, 1949  
CERTIORARI GRANTED MARCH 22, 1949

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 558

FEDERAL POWER COMMISSION,  
PETITIONER,

VS.

PANHANDLE EASTERN PIPE LINE COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the District Court of the United States  
For the District of Delaware

Civil Action No. 1172

FEDERAL POWER COMMISSION,

*Plaintiff,*

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, a corporation,  
*Defendant.*

*Docket Entries*

1. Nov. 13, 1948 Complaint; summons issued.
2. Nov. 13, 1948 Motion for a preliminary injunction.
3. Nov. 13, 1948 Restraining order and order setting motion for preliminary injunction down for hearing on Nov. 23, 1948.
4. Nov. 13, 1948 Memo of plaintiff on points and authorities in support of its motion for preliminary injunction.
5. Nov. 13, 1948 Order specially appointing Daniel L. Herrmann to make service of summons and restraining order.
- 2a 6. Nov. 16, 1948 Daniel L. Herrmann returns on summons, etc. marked "Served 11/13/48."
7. Nov. 16, 1948 Motion of defendant to dissolve temporary restraining order with affidavit of Hy Bird.
8. Nov. 18, 1948 Affidavit of Edward L. Dunn.
- H. Nov. 18, 1948 Hearing on defendant's motion to dissolve temporary restraining order, and on plaintiff's motion for preliminary injunction.
9. Nov. 18, 1948 Brief of plaintiff *re* defendant's motion to dissolve restraining order.
10. Nov. 18, 1948 Brief of defendant *re* its motion to dissolve restraining order.
11. Nov. 22, 1948 Reporter's notes of hearing on defendant's motion to dissolve temporary restraining order.

12. Nov. 22, 1948 Transcript of hearing on motion of defendant to dissolve temporary restraining order.
13. Nov. 22, 1948 Affidavit of Wm. G. Maguire.
14. Nov. 22, 1948 Reply memo of defendant in opposition to plaintiff's motion for preliminary injunction and in support of defendant's motion to dissolve temporary restraining order.
15. Nov. 22, 1948 Order extending temporary restraining order until Dec. 1, 1948.
16. Nov. 24, 1948 Motion of Gregory B. Smith to intervene with proposed Intervenor's Petition attached.
- H. Nov. 24, 1948 Hearing on motion of Smith to intervene.
17. Nov. 24, 1948 Appearance of Arthur G. Connolly for G. B. Smith, applicant for intervention.
18. Nov. 24, 1948 Supplemental brief of plaintiff in support of motion for preliminary injunction.
19. Nov. 26, 1948 Court's memorandum *re* plaintiff's motion for a preliminary injunction (Notice to counsel).
20. Nov. 26, 1948 Order granting motion of Gregory B. Smith to intervene.
21. Nov. 26, 1948 Answer of intervenor defendant, Gregory B. Smith.
- 3a 22. Nov. 29, 1948 Motion of Stephen Carlton Clark, *et al.*, to intervene as defendants.
23. Nov. 29, 1948 Order granting leave of petitioner Stephen Carlton Clark, *et al.*, to intervene as defendants.
24. Nov. 29, 1948 Petition for intervention by Stephen Carlton Clark, *et al.*
25. Nov. 29, 1948 Answer of intervenor defendant, Stephen Carlton Clark, *et al.*
26. Nov. 30, 1948 Stipulation; same day order amending complaint.
27. Nov. 30, 1948 Order denying plaintiff's motion for a preliminary injunction (Notice to counsel).
28. Nov. 30, 1948 Court's findings of fact and conclusions of law.
29. Nov. 30, 1948 Plaintiff's notice of appeal (Copies of Counsel and Clerk, U. S. Court of Appeals).

30. Nov. 30, 1948 Plaintiff's notice of application to U. S. Court of Appeals for a stay pending appeal.
31. Nov. 30, 1948 Order denying plaintiff's motion for a stay pending appeal.

## IN UNITED STATES DISTRICT COURT

### *Complaint for Injunction*

The plaintiff for cause of action against the defendant, alleges as follows:

#### I.

This action arises under the Natural Gas Act, 52 Stat. 833, particularly Sections 20 (a) and 22 thereof (15 U. S. C., Secs. 717s(a) and 717u), as hereinafter more fully appears.

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#### II.

The plaintiff, Federal Power Commission (sometimes hereinafter referred to as the "Commission"), is an administrative agency of the United States of America, charged, *inter alia*, with the administration of the Natural Gas Act, and having its principal office at 1800 Pennsylvania Avenue, N. W., Washington, D. C.

#### III.

The defendant, Panhandle Eastern Pipe Line Company (hereinafter referred to as "Panhandle"), is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, within the jurisdiction of the United States District Court for the District of Delaware, and is an inhabitant of such district.

#### IV.

As hereinafter more fully appears, defendant is engaged in the transportation of natural gas in interstate commerce, and the sale in interstate commerce of such gas for resale, and is a "natural-gas company" within the meaning of the Natural Gas Act, and so subject to the jurisdiction of the Federal Power Commission under the provisions of said Act.

#### V.

Defendant owns and operates, and at all times herein mentioned, owned and operated, an integrated natural-gas



pipe-line system originating in the Hugoton natural-gas field of Kansas, Oklahoma and Texas and the Panhandle natural-gas field of Texas, and extending across the States of Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and into the State of Michigan. By means of such system, defendant, pursuant to contracts obligating it so to do, and on file with the Commission as rate schedules under the Natural Gas Act, supplies natural gas to distributing companies along the route thereof serving in excess of 1,500,000 consumers. Such system has been and is maintained and operated by defendant for the purpose of supplying natural gas to the public which such system was and is capable of serving.

#### VI.

At all times herein mentioned prior to October 1948, defendant owned certain oil and gas leases and gas leases on 96,164.21 acres of land located in Grant and Stevens Counties, Kansas, in the Hugoton natural-gas field, having estimated gas reserves of 700 billion cubic feet or in excess thereof.

#### VII.

On September 22, 1948, defendant organized Hugoton Production Company (hereinafter referred to as "Hugoton"), a Delaware corporation, which has an authorized capital stock consisting of 1,500,000 shares of \$1.00 par value.

#### VIII.

On or shortly before October 11, 1948, defendant, Panhandle and Hugoton entered, or attempted to enter, into a contract, whereby Hugoton agreed to issue 810,000 shares of its stock to Panhandle, and Panhandle agreed, in consideration thereof, to pay to Hugoton the sum of \$675,000 in cash and to transfer, assign and convey to Hugoton the oil and gas leases and gas leases covering the 96,164.21 acres referred to in paragraph VI hereof, together with certain oil leases covering 640 additional acres. It was further understood and agreed between Panhandle and Hugoton that Hugoton would promptly proceed to develop the acreage to be transferred to it and attempt to negotiate sales of gas therefrom to purchasers other than Panhandle; however, that beginning on January 1, 1965, Panhandle would have the option to purchase all gas produced from these leases at such price as Hugoton could then obtain from

others. The parties contemplated that under expected rates of withdrawal of gas from the leases transferred to Hugoton during the period to 1965, Hugoton would produce and sell approximately 300 billion cubic feet of gas.

#### IX.

On October 11, 1948, pursuant to such agreement or purported agreement, Hugoton issued the 810,000 shares of its stock to Panhandle; and the sum of \$675,000 in cash was paid by Panhandle to Hugoton, and the aforementioned leases were transferred, assigned and conveyed; or attempted to be transferred, assigned and conveyed, by Panhandle to Hugoton.

#### X.

Such 810,000 shares of stock comprise all of the outstanding stock of Hugoton, and Hugoton is the wholly-owned subsidiary of the defendant, Panhandle. All of the officers and directors of Hugoton are officers and directors of Panhandle. The sole office of Hugoton, other than its statutory office in the State of its incorporation, is the executive office of Panhandle in New York, New York. Hugoton has no executive officers or employees other than those employed by and paid by Panhandle. Its present assets consist only of the \$675,000 cash and the aforementioned leases.

#### XI.

On October 11, 1948, the Board of Directors of Panhandle declared a dividend in kind at the rate of one-half share of the capital stock of Hugoton for each 1,620,000 outstanding shares of common stock of Panhandle. Panhandle proposes, on or before November 17, 1948, to pay this dividend to its common stockholders.

#### XII.

On October 26, 1948, the Commission issued an order *In the Matter of Panhandle Eastern Pipe Line Company*, Docket No. G-1147, a copy of which is attached hereto as Exhibit "A" and made a part of this complaint, instituting an investigation, pursuant to Section 14 of the Natural Gas Act, of the facts and circumstances involved in the formation and proposed operation of Hugoton and the transfer to Hugoton by defendant of the natural-gas reserves referred to in Paragraph VI hereof. On November 10, 1948, the Commission issued another order in the same matter.

a copy of which is attached hereto as Exhibit "B" and made a part of this complaint. By said order, *inter alia*, defendant and Hugoton are required to show cause, if any there be, at a public hearing to be held before the Commission commencing on January 24, 1949, why the Commission should not by order, find, determine and direct:

- (i) That Panhandle and Hugoton cancel the contract, or purported contract, referred to in Paragraph VIII hereof, and that Panhandle return to Hugoton the aforesaid 810,000 shares of capital stock of Hugoton, and cause Hugoton to return to Panhandle the leases on the 96,164.21 acres referred to in Paragraph VI hereof, together with the \$675,000 in cash received by Hugoton as aforesaid from Panhandle.
- (ii) That Panhandle be prohibited from again transferring, assigning or conveying such leases without the consent of the Commission being first had and obtained.
- (iii) That Panhandle refrain from paying to its stockholders, as a dividend or otherwise, such 810,000 shares of the capital stock of Hugoton, and refrain from transferring the title to such shares of stock to such stockholders or to any person other than Hugoton.

### XIII.

In order, *inter alia*, that Panhandle, which is a "natural-gas company" within the purview of the Act and hence subject to the Commission's jurisdiction, not relinquish its stock-ownership control of Hugoton, which latter company has not been declared by the Commission to be a "natural-gas company," the Commission in said order of November 10, 1948, further required that, pending final determination by the Commission of the questions to be presented at said

January 24, 1949 hearing, Panhandle refrain from paying to its stockholders, as a dividend or otherwise, its 810,000 shares of the capital stock of Hugoton. The Commission further required in said order that Panhandle cause Hugoton to refrain from transferring, assigning or conveying the leases described in Paragraph VI hereof, or any of them, to any person, and from issuing or transferring any of its capital stock to any person; and that pending final determination by the Commission of the questions presented at the hearing, Hugoton refrain from transferring, assigning or conveying the leases described

in Paragraph VI hereof, or any of them, to any person, and from issuing or transferring any of its capital stock to any person.

#### XIV.

On November 10, 1948, immediately upon issuing its said order of November 10, 1948, the Commission informed defendant by telegram of such issuance and directed defendant to notify the Commission by November 12, 1948, that it would comply with the requirement of Paragraph (D) of such order. This, Panhandle failed and refused to do. Therefore, plaintiff avers on information as aforesaid and belief that defendant, Panhandle, is about to distribute the said 810,000 shares of the capital stock of Hugoton to the holders of common stock of Panhandle by way of dividend on or before November 17, 1948, and, unless restrained by this Court, will so distribute said stock.

#### XV.

Plaintiff is informed and believes and therefore alleges that a considerable volume of the capital stock of Hugoton is already being sold on the open market by common stockholders of defendant, Panhandle, on the basis of "if, as and when" the shares of stock are transferred to them by Panhandle; and the common stockholders of Panhandle are numerous.

#### XVI.

The proposed and threatened act of the defendant referred to in Paragraph XIV hereof will constitute a violation of the order of the Commission dated November 10, 1948, Exhibit "B" hereto.

#### XVII.

The delay rentals, renewal bonus payments and other exploration and development costs relating to the aforesaid natural-gas leases included by the Commission in Panhandle's operating revenue deductions in the rate proceedings referred to in Paragraph (c) of the Commission's order of November 10, 1948, Exhibit "B" hereto, amount to date to a sum in excess of \$665,000. The total estimated capital cost of the "Group A," "Group B" and "Group C" facilities authorized by the Commission for the purpose of enlarging Panhandle's system, referred to in Paragraphs (d) to (k), inclusive, of said order of November 10, 1948, is \$56,988,550. By reason of these facts, and by reason of



the facts and circumstances recited in Paragraphs (c) to (l), inclusive, and (r) and (s) of the order of November 10, 1948, which recitals are here incorporated as allegations, it may be that defendant could not lawfully transfer to Hugoton the natural-gas leases, without prior authorization by the Commission based on a finding that the public convenience and necessity permitted such transfer. Particularly by reason of the facts recited in Paragraphs (c),

(l) and (r) of said order, the public served by defendant's integrated system will suffer great injury and damage if the transfer of such gas leases be not lawful. Unless such public be protected by injunctive relief issuing out of this Court, the equitable ownership of such leases will be distributed amongst the common stockholders of defendant, by reason of the proposed transfer to them of the capital stock of Hugoton. Thereby the revocation and recalling by Panhandle of any dedication or pledge of the leases to the service of such public will be placed beyond retraction or power of abrogation by the Commission prior to an adjudication of the questions of the lawfulness of, and justification in the public interest for, the acts of defendant and Hugoton.

### XVIII.

Unless action is taken to enjoin the following acts in violation of the order of the Commission of November 10, 1948, pending the aforementioned hearing before the Commission and its decision upon the questions there presented:

(i) the paying by defendant to its stockholders of the dividend consisting of the 810,000 shares of the capital stock of Hugoton, (ii) the delivery by defendant to such stockholders of certificates for such 810,000 shares of stock, (iii) the transfer of the title to such shares of stock by defendant to such stockholders or to any person, (iv) defendant's permitting Hugoton to transfer, assign or convey the leases described in Paragraph VI hereof, or any of them, to any person, and (v) defendant's permitting Hugoton to issue or transfer any of Hugoton's capital stock to any person—immediate, great and irreparable injury will be caused to the public served by the system of defendant.

12a WHEREFORE, plaintiff, the Federal Power Commission, prays:

1. That a summons issue out of this Court to the above-named defendant and that defendant be required to answer this complaint, paragraph by paragraph, but not under oath, answer under oath being hereby expressly waived.

2. That this Court issue a temporary restraining order (i) restraining defendant Panhandle, its officers, agents, representatives and employees, pending the issuance of the preliminary injunction hereinafter prayed for, from paying to its common stockholders as a dividend the 810,000 shares of the capital stock of Hugoton, from delivering to such stockholders certificates for such 810,000 shares, and from transferring the title to such shares of stock to such stockholders or to any other person; and (ii) requiring defendant, pending the issuance of the preliminary injunction hereinafter prayed for, to cause Hugoton to refrain from transferring, assigning or conveying the leases described in Paragraph VI hereof, or any of them, to any person, and from issuing or transferring any of its capital stock to any person.

3. That upon hearing, this Court, pending the final determination of this cause, issue a preliminary injunction restraining and enjoining defendant and its officers, agents, representatives and employees, from said acts.—

4. That upon final hearing of this cause, a decree be entered in favor of the plaintiff continuing such preliminary injunction in force and effect pending the final determination by the Commission of the questions presented at the hearing before it referred to in Paragraph XII hereof.

5. That plaintiff have all other and further general and equitable relief to which it may be entitled in the premises.

BRADFORD ROSS  
*General Counsel*

WILLIAM S. TARVER  
*Assistant General Counsel*

HOWELL PURDUE  
*Senior Attorney*

WILLIAM MARVEL  
*United States Attorney*  
*Attorneys for Plaintiff*

*Federal Power Commission*

*Duly sworn to by William S. Tarver jurat omitted in printing. (All in italics)*

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*Exhibit "A" to Complaint*UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Before Nelson Lee Smith, Chairman; Thomas C. Buchanan,

Commissioners: Claude L. Draper, Leland Olds and Harrington Wimberly.

October 26, 1948

In the Matter  
of  
PANHANDLE EASTERN PIPE LINE COMPANYDocket No.  
G-1147

## ORDER INSTITUTING INVESTIGATION

It appearing to the Commission that:

- (a) Panhandle Eastern Pipe Line Company (Panhandle Eastern) a natural-gas company subject to the jurisdiction of this Commission, operates a natural-gas pipe line from the Panhandle, Texas, and Hugoton, Kansas, and Oklahoma fields into the State of Michigan. The pipe line indirectly serves a population of 6,000,000 people in 309 communities. The natural gas which it transports and sells in interstate commerce is partly produced by Panhandle and partly purchased.
- (b) Panhandle Eastern has caused the formation of the Hugoton Production Company, to which it has transferred, in exchange for the Company's stock, approximately 97,000 acres in Grant and Stevens Counties, Kansas, in the Hugoton field. The natural gas reserves underlying such acreage have been estimated by Panhandle Eastern to be approximately 700 billion cubic feet. It is planned to distribute the stock of Hugoton Production Company to Panhandle Eastern stockholders as a dividend.
- 15a (c) Hugoton Production Company has entered into or is negotiating contracts for the sale of natural-gas produced from such acreage in Grant and Stevens Counties, Kansas, to a party or parties other than Panhandle Eastern.
- (d) Panhandle Eastern in support of its numerous and several applications to this Commission for certificates of public convenience and necessity pursuant

to Section 7 of the Natural Gas Act, as amended, has represented to the Commission the continuing availability to it of certain natural-gas reserves, and the issuance of such certificates has been justified, in part, by such representations.

The Commission orders that:

An investigation be and it hereby is instituted, pursuant to the provisions of Section 14 of the Natural Gas Act, of the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said company by Panhandle Eastern of the natural-gas reserves referred to above.

By the Commission.

LEON M. FUQUAY,  
Secretary.

Date of Issuance: October 26, 1948

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*Exhibit "B" to Complaint*

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before

Nelson Lee Smith, Chairman; Thomas C. Buchanan,

Commissioners: Claude L. Draper, Leland Olds and Harrington Wimberly.

November 10, 1948

In the Matter  
of  
PANHANDLE EASTERN PIPE LINE COMPANY

Docket No.  
G-1147

ORDER SUPPLEMENTING ORDER OF OCTOBER 26, 1948, FIXING  
DATE OF HEARING, REQUIRING PARTIES TO SHOW CAUSE,  
AND REQUIRING MAINTENANCE OF STATUS QUO  
PENDING COMMISSION DETERMINATION

It appears to the Commission from the investigation thus far conducted in the above-entitled proceeding and from the record in its Docket Nos. G-706 and G-876 which is incorporated herein by reference, that:

- (a) Panhandle Eastern Pipe Line Company (Panhandle) owns and operates, and at all times herein mentioned, owned and operated, an integrated na-



tural-gas-line system originating in the Hugoton natural-gas field of Kansas, Oklahoma and Texas and the Panhandle natural-gas field of Texas, and extending across the States of Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and into the State of Michigan.

- (b) At all times herein mentioned prior to October 1948, Panhandle owned certain oil and gas leases and gas leases on 96,164.21 acres of land located in Grant and Stevens Counties, Kansas, in the Hugoton natural-gas field, having estimated gas reserves of 700 billion cubic feet or in excess thereof.

17a (c) On September 23, 1942, the Commission issued its opinion and order in rate proceedings, Docket Nos. G-200 and G-207, establishing, among other things, Panhandle's proper rate base and proper operating revenue deductions for the purposes of such rate proceedings (3 FPC 273, *et seq.*). Most of the leases described in paragraph (b) hereof were represented by Panhandle in the said rate proceedings to be used and useful in the operation of Panhandle's then existing natural-gas pipeline facilities in the public service. Based upon said representations and the apparent dedication by Panhandle of such reserves to the service of the public to be supplied from such pipeline system, the Commission permitted said leases to be included in Panhandle's rate base, and permitted the delay rentals, renewal bonus payments and all other exploration and development costs relating to said leases to be included in Panhandle's operating revenue deductions.

- (d) On March 21, 1946, *In the Matter of Panhandle Eastern Pipe Line Company*, Docket No. G-706, Panhandle filed an application with the Commission for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, to authorize it to construct and operate certain facilities referred to as its "Group A" facilities and "Group B" facilities.

- (e) On March 5, 1947, *In the Matter of Panhandle Eastern Pipe Line Company*, Docket No. G-876, Panhandle filed an application with the Commission for a certificate of public convenience and necessity pursuant to said Section 7, as amended, to authorize

18a it to construct and operate certain facilities referred to as its "Group C" facilities.

(f) All of such proposed facilities consisted of compressor units, pipe lines, loop pipe lines and appurtenant facilities at points along the route of Panhandle's aforementioned integrated system, and were sought for the purpose of enlarging such system so as to enable Panhandle to deliver additional natural gas for distribution in communities then served by the system.

(g) In support of its application in Docket No. G-706 respecting the "Group A" and "Group B" facilities, Panhandle represented to the Commission that gas reserves held or controlled by it were adequate to justify the issuance of certificates of public convenience and necessity covering such facilities, and that it was able and willing properly to do the acts and to perform the service proposed. Panhandle represented and specified certain acreage in the Hugoton and Panhandle fields as containing such reserves, and included among such acreage the 96,164.21 acres referred to in paragraph (b) hereof, except for 25,065.88 acres, 73.9% of such 96,164.21 acres being thereby included as part of the acreage making up such reserves.

(h) Upon the strength of such representations, and the apparent dedication by Panhandle of such reserves to the service of the public to be supplied from such pipe-line system, the Commission, on June 4, 1946, entered an order whereby it found that Panhandle's gas supply was adequate to meet such deliveries as might result from the proposed operation of the "Group A" facilities, and that Panhandle was able and willing properly to do the acts and perform the service proposed, and whereby it issued a certificate of public convenience and necessity to Panhandle authorizing the construction and operation of said "Group A" facilities.

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(i) Upon the further strength of such representations and apparent dedication, the Commission, on November 30, 1946, entered an order whereby it found that Panhandle's gas supply was adequate to meet the requirements of the service to be rendered by means of the proposed "Group B" facilities and that Panhandle was able and willing properly to do the acts

and to perform the service proposed, and whereby it issued a certificate of public convenience and necessity to Panhandle authorizing the construction and operation of said "Group B" facilities.

- (j) In support of its application in Docket No. G-876 respecting the "Group C" facilities, Panhandle represented to the Commission that gas reserves held or controlled by it were adequate to justify the issuance of the certificate sought, and that it was able and willing properly to do the acts and to perform the service proposed. Panhandle represented and specified certain acreage in the Hugoton and Panhandle fields as containing such reserves, and included among such acreage, all of the 96,164.21 acres referred to in paragraph (b) hereof except for 1640 acres, 98.3% of such 96,164.21 acres being thereby included as part of the acreage making up such reserves.

20a (k) Upon the strength of such representations, and the apparent dedication by Panhandle of such reserves to the service of the public to be supplied from such pipe-line system, the Commission, on June 10, 1948, entered an order whereby it found that Panhandle's gas supply was adequate to meet the requirements of the service to be rendered by means of the proposed facilities and that Panhandle was able and willing properly to do the acts and to perform the service proposed, and whereby it issued a certificate of public convenience and necessity to Panhandle authorizing the construction and operation of the "Group C" facilities.

- (l) By its representations as described in paragraph (c) hereof Panhandle may have pledged the aforementioned reserves to service of the public by means of its then existing pipe line facilities, and by its representations as described in paragraphs (g), (h), (i), (j) and (k) hereof, Panhandle may have pledged the aforementioned reserves to the aforesaid services and facilities proposed by it and authorized by the Commission, and thereby may have incurred an obligation under the Natural Gas Act to continue to devote them exclusively to said services until determination by the Commission that they are not needed for the services so certificated.

(m) On September 22, 1948, Panhandle organized Hugoton Production Company (Hugoton), a Delaware corporation, which has an authorized capital stock consisting of 1,500,000 shares of \$1.00 par value.

21a

(n) On or shortly before October 11, 1948, Panhandle and Hugoton entered, or attempted to enter, into a contract, whereby Hugoton agreed to issue 810,000 shares of its stock to Panhandle, and Panhandle agreed, in consideration thereof, to pay to Hugoton the sum of \$675,000 in cash and to transfer, assign and convey to Hugoton the oil and gas leases and gas leases covering the 96,164.21 acres referred to in paragraph (b) hereof, together with certain oil leases covering 640 additional acres. It was further understood and agreed between Panhandle and Hugoton that Hugoton would promptly proceed to develop the acreage to be transferred to it and attempt to negotiate sales of gas therefrom to purchasers other than Panhandle; however, that beginning on January 1, 1965, Panhandle would have the option to purchase all gas produced from these leases at such price as Hugoton could then obtain from others. The parties contemplated that under expected rates of withdrawal of gas from the leases transferred to Hugoton during the period to 1965, Hugoton would produce and sell approximately 300 billion cubic feet of gas.

(o) On October 11, 1948, pursuant to such agreement or purported agreement, Hugoton issued the 810,000 shares of its stock to Panhandle; and the sum of \$675,000 in cash was paid by Panhandle to Hugoton, and the aforementioned leases were transferred, assigned and conveyed, or attempted to be transferred, assigned and conveyed, by Panhandle to Hugoton.

22a

(p) Such 810,000 shares of stock comprise all of the outstanding stock of Hugoton, and Hugoton is the wholly-owned subsidiary of Panhandle. All of the officers and directors of Hugoton are officers and directors of Panhandle. The sole office of Hugoton, other than its statutory office in the State of its incorporation, is the executive office of Panhandle in New York, New York. Hugoton has no executive officers or employees other than those employed by and paid by Panhandle. Its present assets consist



only of the \$675,000 cash and the aforementioned leases.

(q) On October 11, 1948, the Board of Directors of Panhandle declared a dividend in kind at the rate of one-half share of the capital stock of Hugoton for each of 1,620,000 outstanding shares of common stock of Panhandle. Panhandle proposes on or before November 17, 1948, to pay this dividend to its common stockholders.

(r) The loss of the gas reserves represented by the leases on the 96,164.21 acres referred to in paragraph (b) hereof, may tend to decrease the service life of the aforementioned "Group A," "Group B" and "Group C" facilities.

(s) In the aforementioned orders of the Commission of June 4, 1946, November 30, 1946 and June 10, 1948, issuing certificates of convenience and necessity, the authorization thereby granted, in the instance of each of such orders, was upon the express condition that the certificate should be effective only so long as Panhandle continued the operations thereby authorized in accordance with the provisions of the Natural Gas Act, as amended, and any pertinent rules, regulations or orders theretofore or thereafter issued by the Commission.

(t) By reason of the facts and circumstances hereinbefore set out, it may be that Panhandle could not lawfully transfer to Hugoton said natural gas leases without prior authorization by this Commission based on a finding that the public convenience and necessity permitted such transfer.

The Commission finds that:

Good cause exists for supplementing its order of October 26, 1948, in this proceeding as hereinafter provided, for holding a public hearing upon the matters and issues involved herein, for requiring Panhandle and Hugoton to show cause as hereinafter specified, and for maintaining the *status quo* pending the Commission's decision upon the questions presented.

The Commission orders that:

(A) The order instituting investigation, dated October 26, 1948, *In the Matter of Panhandle Eastern Pipe Line Company*, Docket No. G-1147, be and the same is hereby supplemented by adding Hugoton Production Company as a party respondent thereto.

(B) A public hearing be held commencing on January 24, 1949, at 10:00 a. m. (EST) in the Hearing Room of the Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C., respecting the matters involved and the issues presented in these proceedings.

(C) At such hearing, Panhandle and Hugoton show cause, under oath, if any there be, why the Commission should not by order, find, determine and direct:

24a

(i) That Panhandle and Hugoton cancel the contract, or purported contract, referred to in paragraph (n) hereof, and that Panhandle return to Hugoton the aforesaid 810,000 shares of capital stock of Hugoton, and cause Hugoton to return to Panhandle, and that Hugoton return to Panhandle, the leases on the 96,164.21 acres referred to in paragraph (b) hereof, together with the \$675,000 in cash received by Hugoton, as aforesaid from Panhandle.

(ii) That Panhandle be prohibited from again transferring, assigning or conveying such leases without the consent of the Commission being first had and obtained.

(iii) That Panhandle refrain from paying to its stockholders, as a dividend or otherwise, such 810,000 shares of the capital stock of Hugoton, and refrain from transferring the title to such shares of stock to such stockholders or to any person other than Hugoton.

(D) Pending final determination by the Commission of the questions presented at the hearing, Panhandle refrain from the acts described in paragraph (C) (iii) hereof, and cause Hugoton to refrain from transferring, assigning or conveying the leases, described in paragraph (b) hereof, or any of them, to any person, and from issuing or transferring any of its capital stock to any person.

(E) Pending final determination by the Commission of the question presented at the hearing, Hugoton refrain from transferring, assigning or conveying the leases, described in paragraph (b) hereof, or any of them, to any person, and from issuing or transferring any of its capital stock to any person.

25a (F) Interested State commissions may participate as provided by Sections 1.8 and 1.37(f) [18 CFR 1.8 and 1.37(f)] of the Commission's Rules of Practice and Procedure.

By the Commission

LEON M. FUQUAY,  
Secretary.

Date of Issuance: November 10, 1948

In United States District Court  
*Motion for Preliminary Injunction*

Comes now the Federal Power Commission, plaintiff in this cause, and moves the Court for a preliminary injunction against the defendant, Panhandle Eastern Pipe Line Company (Panhandle), its officers, agents, representatives and employees, pending final hearing of this cause in accordance with the prayer therefor of the complaint, and for grounds for said motion says:

- (1) Unless a preliminary injunction issues, defendant will violate the Natural Gas Act and an order of the Commission issued pursuant thereto, before this cause can be brought on for final hearing.
- 26a (2) By such violation, the revocation or power of abrogation by the Commission of an agreement entered into on or about October 11, 1948, between defendant and Hugoton Production Company (Hugoton), involving the transfer by the defendant to Hugoton of certain oil and gas leases on 96,164.21 acres of land located in Grant and Stevens Counties, Kansas, in the Hugoton natural-gas field, will be prevented prior to a determination by the Commission in a proceeding pending before it entitled, "In the Matter of Panhandle Eastern Pipe Line Company, Docket No. G-1147," of questions relating to the lawfulness of such agreement.
- (3) By such violation, there is danger of immediate and irreparable injury to the public served by defendant's integrated natural-gas pipe line system originating in Kansas, Oklahoma and Texas and extending across the States of Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and into the State of Michigan, by reason of such public being deprived of the benefit of the gas reserves in the aforementioned acreage transferred by defendant to Hugoton.

In support of this motion, there is attached hereto as exhibits an affidavit of Edward L. Dunn, a copy of a telegram dated November 10, 1948, to defendant, Panhandle, from Leon M. Fuquay, Secretary of the Federal Power Commission, duly certified by said Secretary, and a certification of said Secretary.

27a. WILLIAM MARVEL  
*United States Attorney  
 for the District of Delaware*

BRADFORD ROSS  
*General Counsel*

WILLIAM S. TARVER  
*Assistant General Counsel*

HOWELL PURDUE  
*Senior Attorney  
 Attorneys for Plaintiff  
 Federal Power Commission*

1800 Pennsylvania Avenue, N. W.  
 Washington, D. C.

To Panhandle Eastern Pipe Line Company, defendant herein and to . . . . ., its attorneys:

Please take notice that on the verified complaint filed herein, and the affidavit of Edward L. Dunn, the certified copy of a telegram dated November 10, 1948, to defendant, Panhandle, from Leon M. Fuquay, Secretary of the Federal Power Commission, and a certification of said Secretary, copies of which are served on you with this notice, the undersigned will bring the above motion for preliminary injunction for hearing before the Honorable Paul Leahy, District Judge, on the 23rd day of November, 1948, at 11:00 a.m., or as soon thereafter as counsel can be heard.

Dated this 13th day of November, 1948.

BRADFORD ROSS  
*General Counsel*

WILLIAM S. TARVER  
*Assistant General Counsel*

HOWELL PURDUE  
*Senior Attorney  
 Attorneys for Plaintiff*



28a

*Exhibit "A" to Motion*

## AFFIDAVIT OF EDWARD L. DUNN

Washington,  
District of Columbia, } ss.:

Edward L. Dunn, being first duly sworn, deposes and says:

That affiant is Examiner of Accounts for the Federal Power Commission;

That on October 26, 1948, in accordance with an order of said date *In the Matter of Panhandle Eastern Pipe Line Company*, Docket No. G-1147, affiant was assigned to make an investigation of the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said company by Panhandle Eastern Pipe Line Company of certain natural-gas reserves.

That on October 28 and 29 and November 1, 1948, pursuant to such assignment, affiant inspected the files of Panhandle Eastern Pipe Line Company at the executive office of the company at 120 Broadway, New York, New York, and there met with the officers of the company. That from such inspection and statements made by company officers, affiant was informed that at a meeting of the Board of Directors of Panhandle Eastern Pipe Line Company held on October 11, 1948, the Board of Directors declared a dividend in kind at the rate of one-half share of the capital stock of Hugoton Production Company for each of the 1,620,000 outstanding shares of common stock of Panhandle Eastern Pipe Line Company; that such dividend is payable on November 17, 1948, to stockholders of record at the close of business October 29, 1948; that such dividend comprises all of the stock issued by Hugoton Production Company.

EDWARD L. DUNN.

Subscribed and sworn to before me this 12th day of November, 1948.

BERNICE P. STONE

*Notary Public in and for the  
District of Columbia*

*'Exhibit "B" to Motion*UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

I, Leon M. Fuquay, Secretary of the Federal Power Commission, and official custodian of the records of said Commission, do hereby certify that the attached page is a true copy of a telegram to Panhandle Eastern Pipe Line Company, delivered to a Western Union messenger for dispatching, on November 10, 1948. I further certify that as of the close of official business hours on November 12, 1948, there had not been received by the Commission the response requested in said telegram.

In witness whereof I have hereunto subscribed my name and caused the seal of the Federal Power Commission to be affixed this 12th day of November A. D., 1948, at Washington, D. C.

s/ LEON M. FUQUAY  
*Secretary*

30a

November 10, 1948

Panhandle Eastern Pipe Line Company  
1221 Baltimore Avenue  
Kansas City 6, Missouri

Commission today ordered hearing January 24, 1949, in Docket G-1147 regarding Panhandle's right to transfer gas leases to Hugoton Production Company. Paragraph (D) of order requires Panhandle to refrain from transferring to its stockholders the capital stock of Hugoton pending final determination by Commission after said hearing. Advise by November 12, 1948 you will comply with this requirement.

LEON M. FUQUAY, *Secretary*  
*Federal Power Commission*

In United States District Court*Restraining Order and Order Setting Motion for  
Preliminary Injunction for Hearing*

At a session of said Court held in the Federal Building, Wilmington, Delaware, on the 13th day of November, A. D., 1948

PRESENT: Honorable Paul Leahy

*District Judge*

WHEREAS, in this cause it has been made to appear by the verified complaint of plaintiff, Federal Power Commis-

sion (referred to as Commission), filed herein, and the affidavit of Edward L. Dunn, a copy of a telegram dated November 10, 1948, to defendant, Panhandle Eastern Pipe Line Company (Panhandle) from Leon M. Fuquay, Secretary of the Federal Power Commission, duly certified by said secretary, and the certification of Leon M. Fuquay,

Secretary of the Federal Power Commission that at 31a the close of official business hours on November 12,

1948, Panhandle had not notified the Commission that it would comply with the direction of the Commission contained in said telegram, that there is presented to the Commission in a proceeding pending before it entitled, "*In the Matter of Panhandle Eastern Pipe Line Company*, Docket No. G-1147;" questions relating to the lawfulness of an agreement entered into on or about October 11, 1948, between defendant and Hugoton Production Company (Hugoton), whereby defendant transferred to Hugoton certain oil and gas leases on 96,164.21 acres of land located in Grant and Stevens Counties, Kansas, in the Hugoton natural-gas field, and paid Hugoton the sum of \$675,000, in consideration of the issuance by Hugoton of 810,000 shares of its capital stock to Panhandle, and whereby defendant and Hugoton agreed that Hugoton would promptly proceed to develop the acreage to be transferred to it and attempt to negotiate sales of gas therefrom to purchasers other than defendant; that by order of the Commission issued November 10, 1948, said questions in said proceeding have been set down for hearing before the Commission on January 24, 1949, and Panhandle has been ordered by the Commission pending final determination by it of the questions presented at said hearing, to refrain from paying to its stockholders, as a dividend or otherwise, said 810,000 shares of the capital stock of Hugoton and to refrain from transferring the title to said shares of stock to such stockholders or to any person other than Hugoton; that Panhandle threatens, on or before November 17, 1948, and prior to determination by the Commission of the proceeding now before it, to distribute the said 810,000 shares of the capital stock of Hugoton, which is all of the outstanding stock of Hugoton, to the holders of common stock of Panhandle by way of dividend; that thereby the retraction or power of abrogation by the Commission of such agreement will be prevented; that unless defendant is immediately restrained from doing such threatened acts, it will violate said order of November 10, 1948, and immediate and irreparable injury to the public served by defendant's integrated natural-gas-pipe-line sys-

tem originating in Kansas, Oklahoma, and Texas, and extending across the States of Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and into the State of Michigan, will insue by reason of such public being deprived of the benefit of the gas reserves in the aforementioned acreage.

Now, THEREFORE, upon motion of plaintiff, it is ordered that defendant Panhandle Eastern Pipe Line Company, its officers, agents, representatives and employees, be and they are hereby temporarily restrained and enjoined from,

- (i) Paying to its stockholders the dividend consisting of 810,000 shares of the capital stock of Hugoton;
  - (ii) Delivering to such stockholders certificates for such 810,000 shares of stock, and
  - (iii) Transferring the title to such shares of stock to such stockholders or to any person or persons;
- and requiring defendant to cause Hugoton to refrain from transferring, assigning or conveying the leases described in Paragraph VI of the complaint, or any of them, to any person, and from issuing or transferring any of its capital stock to any person.

This restraining order will remain in force only until the hearing and determination of the application for a preliminary injunction herein, and shall expire within ten days after entry, unless within said time it is extended for a like period for good cause shown or unless defendant herein consents that it may be extended for a longer period. The matter of the issuance of a preliminary injunction is hereby set down for hearing on the 23rd day of November, 1948, at 11 o'clock, in the forenoon of said day, in the United States District Court, Room 218, in the Federal Building, in the City of Wilmington, Delaware. Defendant shall file its counter affidavits, if any, on or before the 19th day of November, 1948.

This order issued at 10:35 a.m., this 13th day of November, 1948, shall take effect upon service of a copy hereof, a copy of the complaint and a copy of the motion for preliminary injunction upon the defendant.

Let service of a copy of this order, together with the papers on which it was issued, be deemed good and sufficient service.

In United States District Court

*Motion to Dissolve Temporary Restraining Order*

PLEASE TAKE NOTICE that on the proceedings herein and on the affidavit of Hy Byrd sworn to November 16, 1948,



the defendant Panhandle Eastern Pipe Line Company will move the Court on the 18th day of November, 1948, at 2:00 P.M., or as soon thereafter as Counsel can be heard, before the Honorable Paul Leahy, United States District Judge, at the Courthouse of the United States District Court for the District of Delaware, Wilmington, Delaware, to dissolve the temporary restraining order obtained by the plaintiff Federal Power Commission without notice on November 13, 1948, on the ground that such order is not necessary for the prevention of irreparable injury to the public, and for such other and further relief as to the Court may seem just and proper. This motion is made under Rule 65 of the Rules of Civil Procedure.

Dated: Wilmington, Delaware, November 16, 1948

SOUTHERLAND, BERL & POTTER

*Attorneys for defendant*

*Panhandle Eastern Pipe Line*

*Company*

Delaware Trust Building

Wilmington 28, Delaware

*Affidavit in Support of Defendant's Motion to Dissolve  
Temporary Restraining Order*

State of New York, }  
County of New York. } ss.:

I, HY BYRD, being duly sworn, depose and say:

1. I am Vice President and Treasurer and a Director of Panhandle Eastern Pipe Line Company (hereinafter sometimes referred to as "Panhandle"), the defendant in this case; and I am Treasurer and a Director of Hugoton Production Company (hereinafter sometimes referred to as "Hugoton"). I am familiar with the transactions involved in this suit, and I make this affidavit in support of the motion made by the defendant to dissolve the temporary restraining order obtained by the plaintiff.

2. The agreement dated October 11, 1948, between Panhandle and Hugoton providing for the issuance and sale by Hugoton to Panhandle of 810,000 shares of common stock of Hugoton was approved by the Boards of Directors of Panhandle and Hugoton on October 11, 1948. On the same day such sale was consummated. Panhandle delivered to Hugoton the consideration for such shares of stock consisting of \$675,000 in cash and the conveyance by Panhandle to Hugoton of all of Panhandle's right, title and

interest in and to oil gas leases, gas leases, and oil leases on approximately 97,000 acres of undeveloped land located in Grant and Stevens Counties, Kansas, Panhandle retaining the option to purchase, on and after January 1, 1963, all or any specified portion of the gas being produced from such acreage. Hugoton delivered to Panhandle certificate No. 1 for 810,000 shares of common stock of Hugoton.

3. On the same day, *i. e.*, October 11, 1948, the Board of Directors of Panhandle adopted resolutions in the form annexed hereto and made a part hereof and marked Exhibit A declaring said 810,000 shares of common stock of Hugoton out of net profits or net assets or earned surplus earned subsequently to January 1, 1946, as a special dividend on the common stock of Panhandle, such shares of common stock of Hugoton to be distributed on November 17, 1948, to holders of common stock of Panhandle as they appeared of record at the close of business October 29, 1948, at the rate of one-half share of common stock of Hugoton for each share of common stock of Panhandle held by such holders, scrip certificates to be issued in lieu of fractional shares. The holders of common stock of Panhandle were advised of the declaration of such dividend in a letter mailed to them on October 11, 1948, a true and correct copy of which is annexed hereto and made a part hereof and marked Exhibit B.

4. On said date, *i. e.*, October 11, 1948, the Board of Directors of Hugoton duly adopted resolutions appointing The New York Trust Company of New York, New York, and United States Corporation Company, of Jersey City, New Jersey, transfer agents of the certificates for common stock of Hugoton and appointed said United States Corporation Company its agent with respect to the issuance of said scrip certificates.

5. Thereafter, *i. e.*, on October 19, 1948, Panhandle and Hugoton made arrangements with United States Corporation Company, of Jersey City, New Jersey, to distribute certificates for shares of stock and scrip certificates of Hugoton to the stockholders of Panhandle in satisfaction of said dividend. True and correct copies of letters dated October 19, 1948, from Panhandle and Hugoton respectively to United States Corporation Company are attached hereto and made a part hereof and marked Exhibits C and D.

6. Thereafter, *i. e.*, on October 29, 1948, Panhandle delivered to United States Corporation Company certificate No. 1 for 810,000 shares of common stock of Hugoton registered

in the name of Panhandle and assigned in blank for transfer to the owners of the common stock of Hugoton, i. e., the stockholders of record of Panhandle, at the close of business on October 29, 1948. A true and correct copy of the letter of Panhandle to United States Corporation Company transmitting said certificate for \$10,000 shares of the common stock of Hugoton is annexed hereto and marked Exhibit E.

7. The common stock of Hugoton has been widely traded on the "over the counter" market on a "when, as and if" basis since on or about October 13, 1948. The common stock of Panhandle is a listed security on the New York Stock Exchange, and since the record date of October 29, 1948, for determining the holders of common stock of Panhandle entitled to receive the dividend in shares of common stock of Hugoton, the common stock of Panhandle has been traded on the New York Stock Exchange on an "ex-dividend" basis, which means that trades made after the record date do not include the right to receive such dividend.

8. Up to November 15, 1948, United States Corporation Company prepared certificates of stock and scrip certificates of Hugoton aggregating 810,000 shares registered in the names of all of the holders entitled thereto and inserted the same in envelopes ready to mail, intending to mail said certificates on November 15 and November 16, 1948. Federal stock transfer stamps were attached to said certificate No. 1 for \$10,000 shares transferred from the name of Panhandle to the name of said respective stockholders and the said stamps were duly cancelled.

9. Annexed hereto and made a part hereof and marked Exhibit F is a form of letter dated November 17, 1948, which Panhandle proposed to have sent to the holders of its common stock in the same envelopes in which the certificates for common stock of Hugoton were to be sent.

10. By reason of all of the foregoing the stockholders of record of Panhandle as of October 29, 1948, became on said date the stockholders of Hugoton, and it is a manifest hardship on such stockholders of Hugoton to be deprived of the certificates evidencing their ownership of such stock.

11. I have been advised by counsel and verily believe that the Federal Power Commission is without power to impose upon Panhandle any of the restraints sought to be imposed by the order of said Commission dated November 10, 1948.

12. I am informed by counsel and verily believe that the Federal Power Commission is without power to cancel or direct the cancellation of the agreement dated 38a October 11, 1948 between Panhandle and Hugoton, or to require Panhandle to return to Hugoton the aforesaid mentioned 810,000 shares of common stock of Hugoton, or to require Hugoton to return to Panhandle the consideration for such stock; or to prohibit Panhandle from transferring, assigning or conveying the aforementioned gas leases covering acreage in Grant and Stevens Counties, Kansas, without first obtaining the consent of the Federal Power Commission; or to require Panhandle to refrain from paying to its stockholders as a dividend or otherwise, said 810,000 shares of common stock of Hugoton, or to require Panhandle to refrain from transferring the title to such shares of stock to its stockholders or to any other person.

13. Under date of October 18, 1948, Hugoton entered into a contract with Kansas Power and Light Company providing for the sale by Hugoton to said Kansas Power and Light Company for the period of fifteen years from November 1, 1949 to November 1, 1964, of gas to be produced by Hugoton from the gas leases in Grant and Stevens Counties, Kansas, acquired by it from Panhandle as aforesaid. Said contract provides, among other things, that all volumes of natural gas covered thereby are to be produced from wells located in the State of Kansas and Kansas Power and Light Company agrees that said gas is to be consumed by it or sold by it for consumption wholly within said State of Kansas. While the reserves in the acreage covered by the leases transferred to Hugoton amount to about 700 billion cubic feet, the total volume of gas to be sold by Hugoton to Kansas Power and Light Company for the entire period of said contract approximates only

39a 300 billion cubic feet, and as indicated above, Panhandle retains an option to purchase the balance of the reserves after the expiration of the contract. A true and correct copy of said contract dated October 18, 1948 between Hugoton and Kansas Power and Light Company will be handed up to the Court upon the argument of this motion.

14. No injury to the public will result from the transfer of the aforementioned gas leases by Panhandle to Hugoton. Such transfer resulted in a net decrease in Panhandle's reserves of less than 5%; and Panhandle now owns or controls, after such transfer, over 6,000 billion (6 trillion) cubic feet of gas, or more than enough gas reserves to serve



its entire system, including facilities authorized but not yet constructed, for more than 25 years. Such gas reserves of Panhandle are as adequate as those of any other certificated pipe line company and are more adequate than those of the great majority of such companies.

The present reserves are approximately 20% greater than those which Panhandle owned or controlled when it made applications for the installation of its Group A and Group B facilities in March, 1946.

Its reserves are only about 5% less than they were in March, 1947, when Panhandle applied for a certificate of public convenience and necessity to install its Group C facilities, the construction of which had not yet commenced. This decrease may reasonably be expected to be offset by increases in reserves resulting from the development of leases presently classified as marginal or unproven. But in any event may be regarded as having no material effect on the service which Panhandle will be capable of rendering.

40a It must be borne in mind however that the reserves which constitute the small diminution in the total reserves of Panhandle mentioned above are not in any sense lost to the public, but are now vested in Hugoton and are to be sold to Kansas Power and Light Company pursuant to the contract mentioned in paragraph 13 hereof for distribution to consumers in the State of Kansas.

15. Despite the allegations in the order of the Federal Power Commission attached to the complaint, Panhandle has never dedicated these reserves to consumers using its pipe-line system. It has been the practice in the industry to trade freely in gas leases, and the Federal Power Commission has never heretofore asserted the right to regulate such transactions, so far as I am aware. The Natural Gas Act expressly provides that it shall not apply to production of natural gas.

16. Not only was notice of the transactions between Panhandle and Hugoton referred to above given to all stockholders of Panhandle on October 11, 1948 through the medium of the letter annexed hereto and marked Exhibit B, but such transactions also received wide publicity in the press; and the Federal Power Commission was advised informally of such transactions on or about October 11, 1948.

WHEREFORE, I respectfully request that the temporary restraining order obtained by the plaintiff, Federal Power

Commission, against the defendant, Panhandle Eastern Pipe Line Company, on November 13, 1948, be dissolved and vacated, and that such other and further relief be granted the defendant, Panhandle Eastern Pipe Line Company, as to the Court may seem just and proper.

Hy Byrd:

Sworn to before me this  
16th day of November, 1948.

Frank A. Meyer,  
Notary Public in the State of N. Y.  
Residing in Kings County.

41a                      Exhibit "A"      Affidavit.

*Resolutions of Board of Directors of Panhandle Eastern Pipe Line Company adopted October 11, 1948*

WHEREAS it is anticipated that this Company will shortly receive pursuant to an Agreement heretofore approved at this meeting, 810,000 shares of Common Stock, of the par value of \$1.00 per share, of Hugoton Production Company;

WHEREAS this Board has determined to distribute such shares of stock to the holders of Common Stock of this Company; and

WHEREAS it appears from statements presented to this meeting and made a part of the minutes thereof there is available for dividends on the Common Stock of this Company net profits or net assets or earned surplus earned subsequently to January 1, 1946 of this Company (after allowing for payment of cash dividends heretofore at this meeting declared on the Common Stock of this company) in excess of all requirements of the tests prescribed in or required by the provisions of this Company's Certificate of Incorporation, as amended, its Indenture, dated as of May 1, 1946, with respect to the Serial Debentures due \$2,000,000 on each May 1, 1949 to 1971 inclusive, and its Credit Agreement dated July 29, 1946, as amended by Supplemental Agreement, dated August 1, 1947.

NOW, THEREFORE, BE IT RESOLVED that upon the receipt by this Company of 810,000 shares of Common Stock of Hugoton Production Company pursuant to the Agreement hereinabove mentioned, such shares of stock of Hugoton Production Company be, and the same hereby are, declared out of net profits or net assets, or earned surplus earned subsequently to January 1, 1946, of this Company as a special dividend on the Common Stock of this Company;

42a RESOLVED that such shares of Common Stock of Hugoton Production Company shall be distributed on November 17, 1948, to holders of Common Stock of this Company as they appear of record at the close of business October 29, 1948, in satisfaction of said dividend at the rate of one-half share of such Common Stock of Hugoton Production Company for each share of Common Stock of this Company held by such holders; provided that no fractional shares of such Common Stock of Hugoton Production Company shall be issued, but that in lieu of certificates for fractional shares such holders shall receive Scrip Certificates representing fractional interests and providing substantially as follows: that the bearers of such certificates upon surrender thereof on or before December 31, 1950 with other scrip certificates aggregating one or more whole shares shall be entitled to receive in exchange therefor a certificate or certificates for Common Stock of Hugoton Production Company for the full share or shares represented in the aggregate by the surrendered scrip certificates; that no dividends or interest shall be paid or shall accrue with respect to such scrip certificates, and that the holders thereof shall be entitled to no voting or other rights of stockholders; and that as soon as practicable after December 31, 1950, the Scrip Agent to be appointed with respect to such scrip certificates will sell for cash at public or private sale for the account of the holders of such scrip certificates the number of shares of Common Stock of Hugoton Production Company called for by the total number of scrip certificates outstanding at the close of business December 31, 1950, and that thereafter the holders of such scrip certificates, upon surrender thereof on or before December 31, 1953, will be entitled to receive their pro rata proportion of the net proceeds of such sales; and

43a RESOLVED that the officers of this Company be, and they hereby are, authorized and directed to take from time to time any and all such action as may be necessary or proper to carry out the intention of the foregoing resolutions, including, without limiting the generality of the foregoing, the making of any and all such arrangements as may be necessary or proper to provide for the issuance of and the carrying out of the terms of said Scrip Certificates.

*Exhibit "B" to Affidavit*

PANHANDLE EASTERN PIPE LINE COMPANY  
 120 Broadway  
 New York 5, N. Y.

To the Holders of Common Stock of  
 PANHANDLE EASTERN PIPE LINE COMPANY:

At a meeting held October 11, 1948, the Board of Directors declared the regular quarterly dividend of 75 cents per share payable December 15, 1948, to stockholders of record at the close of business November 26, 1948. The Board of Directors also declared a dividend in kind at the rate of one-half share of the capital stock of Hugoton Production Company ("Hugoton") for each of the 1,620,000 outstanding shares of Common Stock of Panhandle Eastern Pipe Line Company ("Panhandle Eastern"). This dividend is payable on November 17, 1948 to stockholders of record at the close of business October 29, 1948. At the time of payment, there will be mailed to each holder of Common Stock a certificate or certificates for the number of full shares of Hugoton to which he is entitled, together with a transferable scrip certificate for any additional one-half share. Such scrip certificate may be combined with others and then surrendered to Hugoton for issue of a certificate for the number of full shares represented thereby.

44a Hugoton Production Company is a Delaware corporation, organized September 22, 1948 by Panhandle Eastern. Its authorized capital stock consists of 1,500,000 shares of \$1.00 par value, of which 810,000 shares were issued on October 11, 1948 to Panhandle Eastern for \$675,000 cash and oil and gas leases covering approximately 97,000 acres in Grant and Stevens Counties, Kansas. Such leases were transferred at a value of \$135,000. Upon payment of this dividend, all of the outstanding stock of Hugoton will be owned by the holders of the Common Stock of Panhandle Eastern, since this dividend comprises all of such outstanding stock.

The gas reserves under the leases which were transferred to and are now owned by Hugoton are estimated to be approximately 700 billion cubic feet. If such leases were retained by Panhandle Eastern, it is probable that they would not be developed for several years. It is expected that Hugoton will promptly proceed to develop this acreage and attempt to negotiate sales of gas therefrom to purchasers other than Panhandle Eastern. However, beginning January 1, 1965, Panhandle Eastern will have the right, under a contract which has been entered into between



it and Hugoton, to purchase all gas produced from these leases at such price as Hugoton could then obtain from others. Under contemplated rates of withdrawal of gas from the leases transferred to Hugoton during the period to 1965 Hugoton could produce and sell approximately 300 billion cubic feet of gas. Thus Panhandle Eastern's proven gas reserves will still exceed six trillion cubic feet after the transfer of such leases. Panhandle Eastern expects such reserves to be materially increased by development of leases which are presently classified as marginal or unproven.

The present assets of Hugoton consist only of the \$675,000 cash and leases on the acreage in Grant and 45a Stevens Counties, Kansas. Its present liabilities are its 810,000 shares of Common Stock and its commitment to sell gas from such acreage to Panhandle Eastern beginning 1965. Hugoton will send its first report to stockholders after the end of the current year. It is not expected that Hugoton will pay any cash dividends to its stockholders in 1948 or 1949.

The Board of Directors of Hugoton consists of the following, all of whom are directors of Panhandle Eastern: William G. Maguire, Edward Buddrus, Hy Byrd, Charles E. Main and Frank J. Lewis. Its officers are: William G. Maguire, President, Edward Buddrus, Vice-President, Hy Byrd, Treasurer and Leith V. Watkins, Secretary.

We are not now in a position to advise stockholders how they should treat this distribution for federal income tax purposes. Stockholders will be advised as soon as practicable of the opinion of the Company's tax consultants.

PANHANDLE EASTERN PIPE LINE COMPANY

W. G. MAGUIRE,

Chairman

October 11, 1948.

*Exhibit "C" to Affidavit*

PANHANDLE EASTERN PIPE LINE COMPANY

October 19, 1948

United States Corporation Company,

15 Exchange Place,

Jersey City 2, New Jersey.

*Dividend on Common Stock in shares of Common  
Stock of Hugoton Production Company*

Gentlemen:

The undersigned has been informed by Hugoton Production Company that you are the Transfer Agent for

46a the Common Stock of that Company and that you have been notified of the declaration by our Board of Directors at its meeting held October 11, 1948, of a dividend in kind at the rate of one-half share of the Common Stock of Hugoton Production Company for each of the 1,620,000 outstanding shares of the Common Stock of the undersigned, payable November 17, 1948 to stockholders of record at the close of business October 29, 1948.

You are hereby requested to make all arrangements for the distribution of this dividend and upon completion of such distribution to render your statement of charges in duplicate directly to the undersigned.

Yours very truly,

PANHANDLE EASTERN PIPE LINE COMPANY

By HY BYRD

*Vice-President and Treasurer*

*Exhibit "D" to Affidavit*

HUGOTON PRODUCTION COMPANY

120 Broadway

New York 5, N. Y.

October 19, 1948

BY HAND

United States Corporation Company,

15 Exchange Place,

Jersey City 2, New Jersey

Gentlemen:

We have been informed by Panhandle Eastern Pipe Line Company that at a meeting of its Board of Directors held October 11, 1948, a dividend in kind at the rate of one-half share of the Common Stock of the undersigned for each of the 1,620,000 outstanding shares of the Common Stock of Panhandle Eastern Pipe Line Company, was declared payable November 17, 1948, to stockholders of record at the close of business October 29, 1948.

47a We have been requested by said Company to instruct you, as our Transfer Agent, to pay the dividend in conformity with the resolutions so adopted, a certified copy of which is attached. You are hereby requested to proceed under your authority, as the undersigned's Transfer Agent, in accordance with instructions from Panhandle Eastern Pipe Line Company with respect to this dividend.

Please submit your statement of charges in duplicate in conformity with the proposal made in your letter dated October 7, 1948, directly to Panhandle Eastern Pipe Line Company.

Very truly yours,

HUGOTON PRODUCTION COMPANY.

By (signed) LEITH V. WATKINS,  
Secretary.

~~Exhibit "F" to Affidavit~~

~~PANHANDLE EASTERN PIPE LINE COMPANY~~

October 29, 1948.

By HAND.

United States Corporation Company,

15 Exchange Place,

Jersey City 2, New Jersey.

*Dividend on Common Stock in Shares of Common  
Stock of Hugoton Production Company*

Gentlemen:

Supplementing our letter to you dated October 19, 1948, we deliver to you herewith Certificate No. 1 for 810,000 shares of the Common Stock of Hugoton Production Company, which has been assigned in blank for transfer to the owners of the Common Stock of Hugoton Production Company as evidenced by a list of stockholders to be prepared by Chemical Bank & Trust Company as being the stockholders of record of Panhandle Eastern Pipe Line Company at the close of business today.

Please prepare and mail certificates of Hugoton Production Company to the stockholders thereof in accordance with the authorizations previously furnished to you.

Upon receipt of your advice as to the amount of Federal Stock Transfer Tax due on this transaction we will forward you our check in payment therefor.

Yours very truly,

PANHANDLE EASTERN PIPE LINE COMPANY

By HY BYRD,

*Vice President and Treasurer*

*Exhibit "F" to Affidavit*

PANHANDLE EASTERN PIPE LINE COMPANY

120 Broadway  
New York 5, N. Y.

November 17, 1948

To the Holders of Common Stock of

PANHANDLE EASTERN PIPE LINE COMPANY:

The enclosed certificate or certificates are in payment of the dividend, payable in shares of the capital stock of Hugoton Production Company, declared by this Company on October 11, 1948 and payable to holders of Panhandle Eastern Pipe Line Company common stock at the close of business on October 29, 1948 at the rate of one-half share of Hugoton capital stock for each share of Panhandle Eastern Common Stock then owned. Scrip certificates for one-half share of the Hugoton stock may be combined with others and surrendered to its Scrip Agent, the United States Corporation Company, 15 Exchange Place, 49a Jersey City, N. J., for issue of a certificate for the number of full shares represented thereby. The New York Trust Company, 100 Broadway, New York 15, N. Y., and the United States Corporation Company, 15 Exchange Place, Jersey City, N. J., are Transfer Agents for the capital stock of Hugoton.

We quote from a ruling of the Commissioner of Internal Revenue regarding the manner in which you should treat this distribution for Federal income tax purposes:

"Upon the basis of the information submitted, it is held that the proposed distribution will constitute an ordinary dividend, within the meaning of and to the extent provided in section 115(a) of the Internal Revenue Code, taxable to the recipients under Section 22 (a) of the Code.

Each common stockholder of Panhandle will receive taxable income measured by the fair market value on November 17, 1948, of the Hugoton stock distributed to him . . .

It appears that the Hugoton stock will be traded in on the Over-the-Counter Market in New York City. In such case, the fair market value of the Hugoton stock will be the mean between the highest and lowest selling prices in that market on November 17, 1948, or if no sales be made on that date, on the nearest date upon which sales are made."



Since the declaration of this dividend, Hugoton has entered into a contract with The Kansas Power and Light Company, giving it a market, entirely within the State of Kansas, for its anticipated total production during the next fifteen years. The contract provides for the sale, after production and gathering, at satisfactory prices (the minimum price is 12 cents per M. C. F.), of specified quantities of gas in each of the years 1949-64, inclusive, with an option in The Kansas Power and Light Company to continue the contract thereafter if Panhandle Eastern does not elect to take Hugoton's Production after 1964. The total volume of gas to be sold by Hugoton for the entire period of the contract, as specified therein, approximates 300 billion cubic feet.

It is believed that Hugoton will require approximately \$3,000,000 by the end of its first year of operation for the development of its properties, by drilling and construction of necessary gathering lines and other facilities. Hugoton has not yet made any arrangements for financing these capital requirements, but its management does not anticipate difficulty in obtaining the required funds.

Very truly yours,

• PANHANDLE EASTERN PIPE LINE COMPANY.  
By W. G. MAGUIRE,  
*Chairman of the Board.*

In United States District Court

*Affidavit of Edward L. Dunn*

Washington,

District of Columbia.

{ ss.

EDWARD L. DUNN, being first duly sworn, deposes and says:

That affiant is Examiner of Accounts for the Federal Power Commission;

That on October 26, 1948, in accordance with an order of said date *In the Matter of Panhandle Eastern Pipe Line Company*, Docket No. G-1147, affiant was assigned to investigate the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said company by Panhandle Eastern Pipe Line Company of certain natural gas reserves.

That on or about November 1, 1948, pursuant to said assignment, affiant conferred with Mr. W. C. Maguire, Chairman of the Board of Panhandle Eastern Pipe Line Company, and was informed by Mr. Maguire during said conference that the Hugoton Production Company had been organized by Panhandle because the Federal Power Commission had placed the valuable gas reserves of Panhandle in Panhandle's rate base, thereby preventing Panhandle from realizing the full value of said reserves, and that the assignment of gas reserves to Hugoton Production Company and the proposed operating plan of Hugoton Production Company had resulted from careful studies made for the purpose of avoiding regulation of the earnings from the sale of gas produced and gathered from said gas reserves; that if the Federal Power Commission persisted in its present rate fixing methods and procedures, Panhandle might form other production companies similar to Hugoton Production Company which company represented only the start of Panhandle's endeavor to realize additional and unregulated profits for its stockholders from its gas reserves;

That affiant has inspected Panhandle Eastern Pipe Line Company's books and records relating to the leases transferred by Panhandle to Hugoton and that the total original cost of said leases to Panhandle reported thereon was \$162,564.00 and that the annual expenses of carrying said leases was recorded in said books and records at \$66,890.80 for the year ending December 31, 1947.

That affiant on said date was informed by Mr. Maguire and Mr. Hy Byrd, Treasurer and Vice-President of Panhandle Eastern Pipe Line Company that the market price for shares of Hugoton then being traded on an "as if and when basis" was approximately \$13.50 per share; that such price established a current value of approximately

52a \$12,000,000 for the leases transferred to Hugoton Production Company; that the market price of said stock would soon be at least \$20.00 a share and that said market price applied to the 810,000 shares issued by Hugoton would represent a market valuation of approximately \$16,200,000 for the leases transferred to Hugoton Production Company.

EDWARD L. DUNN

Subscribed and sworn to before me

this 17 day of November, 1948

Bernice P. Stone

Notary Public in and for the District of Columbia

In the United States District Court for the  
District of Delaware  
No. 1172 Civil Action.

FEDERAL POWER COMMISSION,

*Plaintiff,*

vs.

PANHANDLE EASTERN PIPE LINE COMPANY,

*Defendant.*

Superior Courtroom No. 1

County Court House

Wilmington, Delaware

November 18, 1948

2:00 P. M., E. S. T.

*Hearing on Motion of Defendant to Dissolve  
Temporary Restraining Order*

(FILE ENDORSEMENT OMITTED)

54-55 Before:

THE HONORABLE PAUL LEAHY, Chief United States  
District Court Judge.

Appearances:

WILLIAM MARVEL, ESQUIRE, United States District Attorney for the District of Delaware, and WILLIAM S. TARVER, ESQUIRE, and HOWELL PURDUE, ESQUIRE, of the Washington D. C. bar, for the plaintiff.

E. ENNALLS BERL, ESQUIRE, and ROBERT P. PATTERSON, ESQUIRE, of the New York bar, for the defendant.

CARL F. FARBACH, ESQUIRE, for a Hugoton stockholder.

KEVIN McINERNEY, ESQUIRE, for a Hugoton stockholder.

JAMES A. AUSTIN, ESQUIRE, for Hugoton stockholders.

GEORGE S. MUNSON, ESQUIRE, for a Hugoton stockholder.

GIRARD SMITH, a Hugoton stockholder.

57

*Argument of Mr. Patterson.*

Mr. PATTERSON.

59

Now, those transactions were public property. The stock of the Panhandle Company is listed on the New York Stock Exchange and full publicity was given to the entire transaction and informal notice given to the Federal Power Commission. We did not give them formal

notice or go to it with the transaction because in our view of the law, the Natural Gas Act, this phase of Panhandle's activities, to-wit, the production of gas, is not subject to the jurisdiction of the Federal Power Commission.

The COURT. Well, Judge Patterson, what was the purpose of giving them any notice?

Mr. PATTERSON. We just wanted them to be advised informally. We thought it might be a matter of interest to them, so we wanted to give them informal notice.

They didn't do anything about it until October 26th when they instituted a proceeding to investigate the transaction under Section 14 of the Natural Gas Act, and we have no objection at all to that. They have specific power under Section 14 to investigate the adequacy or inadequacy of gas reserves. And so the matter rested. They came up and looked at our books and records, and we had no objection to that. We facilitated that. And then we came to November 10th when they issued a supplemental order, and that was quite different. That order was supplemental  
60 and docketed in the same docket and part of the same case as that of the original order of October 26th.

In that order they refer to quite a number of recitals, and then they come down to it—to enjoin the Hugoton Company as a party respondent—and set a date of hearing of January 24th, I believe, and then they say that the two companies shall show cause why the transaction shall not be rescinded. And then the order purports to state some subsidiary clauses to restrain Panhandle in the meantime from making delivery or allowing delivery to be made of the stock certificates of the Hugoton Company.

They wanted to know whether we would comply with that or not, and they got no satisfactory answer. We did answer them, but I will acknowledge that Mr. Tarver was not satisfied, and so he comes here on Saturday and gets a temporary restraining order from your Honor.

Now, that is in general the outline of the facts, and if I have omitted anything or misstated anything I am quite willing for Brother Tarver to interrupt right at this point.

We submit on that that the complaint on which the temporary restraining order was issued does not state a case for injunction or for temporary relief by way of the restraining order. We submit further that even if it  
61 does, the transaction had already gone so far, Panhandle no longer being the owner of stock of Hugoton that thousands of persons owning the stock of Hugoton



—that the restraint on Panhandle against the final act of physical delivery of the stock certificates is of no value to the Federal Power Commission, but imposes a severe hardship and the liability of severe loss on the stockholders of the Hugoton Company—they being the people who were on October 29th stockholders of Panhandle, but there being no longer any identity between the stockholders.

The COURT. Before you discuss Section 20(a), when was the earliest date that the Commission was advised that you were going to distribute your stock?

Mr. PATTERSON. They were informally advised on October 12th, the day after the transaction. As soon as the transaction was entered into we sent a description of the transaction down to our attorneys in Washington, and we were advised by them that they had discussed the matter informally with members of the Federal Power Commission.

62 The COURT. In short, they knew you were going ahead with your program for a month—

Mr. PATTERSON. Yes, sir. That's right.

The COURT. All right, sir.

Mr. PATTERSON. They knew all details of the transaction at that time. They did not, however, examine the exact documents until a date around October 26th, I think, when they came up and were given copies—somewhere in that neighborhood.

Mr. TARVER. Twenty-ninth and thirtieth of October, and the first of November.

Mr. PATTERSON. That was when they came to the Panhandle office and made a detailed examination of the original papers and were furnished copies of everything they wanted.

74 Mr. PATTERSON. In the affidavit of Mr. Byrd at-  
75 tached to my papers we make reference on page 6 to the contract existing between the Hugoton Company and Kansas Power and Light, and we say that a copy of the contract will be handed to the court upon the argument of this motion. The contract referred to is this contract here (indicating), and I will discharge the obligation now, imposed upon me by that little sentence in Mr. Byrd's affidavit, by handing a copy of that contract to your Honor.

The COURT. All right.

*Argument by Mr. Farbach.*

MR. FARBACH. I am Mr. Farbach, representing Investors Mutual, Inc. We are the owners of twelve thousand shares of Hugoton stock. We have been the absolute owners of the stock since the 29th day of October. We gained the right on the 11th of October when the dividend was declared. The Commission has been aware of that throughout that time. Not until the 10th or 11th of November did the Commission make any effort to prevent our getting—not the stock, not the right to the stock; they couldn't touch that—they tried to prevent our getting the certificate of stock. The result of that is that we own the stock and we can't do anything with it. We can't do anything with it until we can get the certificates. We own it. We  
76 can't sell it. We can't deliver it. We can't trade in it in any way.

How long will it be? We don't know. It is a much longer time than we should be required to hold any security, any common stock. We therefore submit that it would work irreparable harm to ourselves and to all other stockholders to be required to hold on to the stock, to remain the owner without being able to deal in it, without being able to protect ourselves against fluctuations in the value, and perhaps take a substantial loss on it.

THE COURT. Have you made any commitments with respect to the shares?

MR. FARBACH. None whatsoever. We therefore oppose strenuously the temporary restraining order and ask that it be lifted.

THE COURT. It occurs to me, for the purposes of this motion, simply to dissolve the restraining order—regardless of what way I ultimately decide that motion I have grave doubt as to whether you can get any appellate review if that would become necessary, whereas if we were here arguing a temporary injunction, any order that I would enter would be appealable, and as is often the case counsel stipulated that for the purposes of argument on the restraining order it will be considered as being argument on the preliminary injunction—I don't  
77 know whether you gentlemen have any thought on that matter or not.

MR. PATTERSON. If your Honor please, it would seem to the defendant to be in the interest of economy of time of court and counsel both, and we have no objection to advancing the date fixed by your Honor for argument on the

motion for preliminary injunction to November 18th, if agreeable to all parties.

The COURT. I have no feeling—

Mr. PATTERSON. Deem this hearing, in other words, not only upon our motion but upon the motion of the Federal Power Commission for a preliminary injunction.

Mr. TARVER. My sole reluctance to agreeing to that proposition possibly can be dissipated by Judge Patterson today. We are without complete knowledge as to the exact extent of this stock transfer. We don't know, nor has the affidavit by Panhandle stated, whether or not there has been any transfer of stock on the transfer books of Hugoton.

Mr. PATTERSON. We stopped in our tracks when we got a copy of your Honor's temporary restraining order. My understanding is this, that the U. S. Corporation Company, which is acting as agent for Hugoton Company, had the stock certificates made out and ready for mailing, but had

not mailed them. They are now in the possession of the U. S. Corporation Company. I might point out, as said in Mr. Byrd's affidavit, that Panhandle on or about October 29th delivered to the U. S. Corporation Company as agent of the Hugoton Company the certificate of stock for the 810,000 shares, endorsed in blank, for transfer to the stockholders and to be cancelled, but the matter rests in abeyance that way. As soon as we got word of what had transpired we held everything. The stock certificates, in other words, according to my information are there in the U. S. Corporation Company in New Jersey made out in the name of the proper stockholders, ready for mailing but not yet mailed.

Mr. TARVER. I understand. It is agreed that there has been no transfer on the transfer books of Hugoton Corporation?

Mr. PATTERSON. Oh, no. Quite the contrary. On the books of Hugoton Corporation the stockholders of record of October 29th are other stockholders and not Panhandle.

Mr. TARVER. There has been a formal transfer?

Mr. PATTERSON. On the books, but not delivery of the stock certificates, and I understand the transfer tax stamp is affixed. Is that right?

Mr. BYRD. Every act has been completed except the mailing of the stock certificates to the owners of the stock.

*Argument of Mr. McInerney.*

Mr. McINERNEY: May it please the court, Loyola University of Chicago, Illinois, is the owner of five thousand shares of Hugoton stock and still the owner of ten thousand shares of Panhandle stock. Judge Patterson has referred to several reasons why the present motion should be granted, but to us it seems the short reason is that the Commission's order of November 10th was made at a time when Panhandle was no longer the owner of the Hugoton stock, but Loyola and other similarly situated stockholders of Panhandle had become owners. That is because on October 29th Panhandle had delivered to the United States Corporation Company of New Jersey the shares of Hugoton endorsed in blank, signed in blank for transfer, with directions to mail the stock out as soon as it could be done in the regular routine, to the stockholders of Panhandle.

Now, it seems to us that after October 29th no order that the Commission could make would be of any force and effect. We are willing to assume purely for the purpose

80 of arguing that the Commission while Panhandle was still the owner of the shares of Hugoton might have made an order inhibiting the dividend. It might perhaps—just for the sake of argument—have prevented the making of the dividend. However, after Loyola had become the owner of these shares—that is, after October 29th—it seems to us that any order of the Commission respecting the position or the disposal of these shares is a nullity on its face. We therefore think that this court should not lend its equitable powers to the interference with Loyola's possession of its own property and should not lend its support to the Commission's order of November 10th which is, we think, invalid on its face.

Now, it may be suggested by Mr. Tarver that a delay of, say, five or ten days or of a month is a matter of no great moment, but to Loyola and similarly situated stockholders it is a matter of tremendous importance. In five or ten days or a month the price which Loyola might get for these shares may be one-half of what it is presently. The present market price of Hugoton I think is around eleven; it may decline to six in a week's time, as we have had recently demonstrated.

THE COURT. I will ask you the same question I asked Mr. Farbach. Have you any commitments with respect to your shares?



81 Mr. McINERNEY. So far as I know we have none. I don't know whether Loyola would sell its shares or retain them, but it seems to me that under the circumstances the court should not even continue the present restraining order but should immediately allow these stockholders to have their property to do with as they please, as their interests dictate.

Thank you, your Honor.

*Argument of Mr. Austin.*

Mr. AUSTIN. May it please the court, we represent the Clark family and such foundations established by them, which together are the owners at the present time of 61,633 shares of Hugoton, and they continue to own 122,366 shares of Panhandle. Now, in each instance that represents approximately eight per cent of the outstanding stocks of those companies, and I think it is the largest independent block of stock that there is.

Now, our people want their stock. It is a simple thing. I don't understand that the Federal Power Commission has any jurisdiction whatsoever to interfere with the declaration and payment of a dividend legally, and I don't understand that they alleged that they do have. I certainly endorse everything that Judge Patterson has said as to their powers with respect to the sale of acreage, but whether or not it could be established or will be established that they have some jurisdiction over that transfer, I say they have none whatsoever when it comes to the delivery of

82 these certificates of stock which we now own and which now stand in our names. Now, it is a normal right of property that one be allowed to dispose of it. I don't know what the purpose of the foundations is, but if the opportunity advantageously presents itself to dispose of stock in the next few days, I think it should be done if that opportunity presents itself.

Now, in answer to your Honor's question of the other gentlemen, I certainly know of no commitments on this stock at this time, but I am informed that certain stockholders have inquired of Panhandle as to whether they should engage in trade in it, in view of the existence of this order, when they might violate State laws pertaining to trusts—

The COURT. The reason for the question is simply that it is one of the elements which equity takes into consideration in balancing the entire picture.

*Statement of Mr. Munson.*

Mr. MUNSON. I represent the Insurance Company of North America. We are not as big a stockholder as some, but we have thirty thousand shares of Panhandle and fifteen thousand shares of Hugoton. In addition to that we have committed ourselves on the open market to buy ten thousand more, so when you ask if we have a commitment, we have a commitment, and I support thoroughly Judge Patterson's argument.

Mr. AUSTIN. The question it seems to me, Judge, is not of our commitments but on the question of the restraint. The restraint applies not only to whether this dividend is distributed, but when issued, trade in the stock, and we urge that we be allowed to get the stock which stands in our name.

*Argument of Mr. Tarver.*

Mr. TARVER. May it please the court, Judge Patterson and I have agreed that we are willing that this argument be considered as argument on the motion for preliminary injunction as well as this. Is that right, Judge Patterson?

84 Mr. PATTERSON. Yes.

Mr. TARVER. \* \* \* In addition we now ask leave to amend our complaint so as to invoke the jurisdiction of this court on the additional ground of its general equity powers.

93 The COURT. Well, what is the blackest picture you can hope to find growing out of this transaction, Mr. Tarver?

Mr. TARVER. The blackest picture growing out of this transaction is that the life of Panhandle's pipe line, which is tested not by the pipe in the ground—because that lasts a long time—but by the volume of gas that it has to run through that pipe, will be cut short in approximately five years, that Panhandle's rate payers will be deprived of the money they have contributed to Panhandle for delay rentals and the maintenance of these gas reserves. In addition Panhandle is now, and it is a matter of such general knowledge that I think your Honor can take almost judicial notice of it, extremely short of gas. When I say "extremely short of gas" I don't mean that its reserves are insufficient to serve its customers, but its pipe line facilities are grossly insufficient to serve its customers. There has been some

legal question arising out of the inability of Panhandle to satisfy all of the requirements of its customers.

Mr. PATTERSON. Please don't take my silence at this point as in any sense acquiescence in that statement.  
94 It has the biggest gas reserves of any company in the business. The gas reserves are bigger than the facilities to take it out.

Mr. TARVER. That is what I said, Judge Patterson.

Mr. PATTERSON. I thought it was the other way around. There is no inability to supply gas, and there won't be for thirty or forty or fifty years. We are in a better position than any other gas company—

Mr. TARVER. Panhandle has no shortage of gas in the ground, and there is no contention that it has, but it does have a shortage of pipe line facilities.

Mr. PATTERSON. I agree in what Colonel Tarver says when he says commitments to customers and consumers up the line exceed pipe line capacity, and that is because these gentlemen have cut our price way down and these people want our gas.

Mr. TARVER. Just recently in Illinois there was a case decided involving a shortage on Panhandle's lines, so I think your Honor can take judicial notice of that.

Well, to proceed, Panhandle because of the insufficiency of its facilities to serve the requirements of its customers—the pipe line facilities—has applied to the Federal Power Commission in the years 1946 and 1947 for three certificates of public convenience and necessity which are required if it is to construct new pipe line facilities. In

95 those applications Panhandle has represented that its reserves including these very reserves now involved were available to serve the facilities sought to be certificated by the Federal Power Commission. On the basis of that representation of Panhandle, among other representations of Panhandle, the Federal Power Commission has issued certificates of public convenience and necessity.

99 The COURT. Well, can you refer me to any authority that a company that has received a certificate must receive the approval of the Commission before it can divest itself of any of its assets?

Mr. TARVER. No, your Honor, I cannot. We contend that that is an implied obligation under the certificate sections of the act,

100 Mr. TARVER.

102 May it please the court, this is the first proceeding of this nature before the Federal Power Commission.

105 If the transfer is illegal, then everything in connection with the transaction is tainted with illegality; the declaration of the dividend is beyond the power of the corporation, and this court should exercise its injunctive powers to halt the transaction until the Federal Power Commission can determine all the facts, all the interests of the public, which interests are peculiarly committed to its care by statute, and determine whether or not there is an injustice and prejudice and disadvantage and preference—which is a determination of fact. Those are matters which can be determined, and a Commission is specifically charged with determining them, only by the Commission.

The COURT. Well, what about the publicly held stock in the meantime? Isn't there a public interest on that side too?

Mr. TARVER. I think it is not—

The COURT. I mean, I think it is very admirable, the devotion you have to the rate payer, but what about the widow or orphan who owns a share of stock?

106 Mr. TARVER. Well, now, I think we worry too much, if the court please—

The COURT. You amended your complaint to call upon the application of equitable principles. Is it conceded that that is a consideration that I should weigh?

Mr. TARVER. If you are exercising solely the equitable powers vested in the court, yes.

110 Mr. TARVER. As your Honor knows, we did not come here intending to argue the motion for a preliminary injunction at this time, and therefore we did not come with any proof with respect to the total volume of Panhandle reserves. All we have is with respect to the percentage of the reserves. Panhandle has set out in an affidavit that was filed that these constitute five per cent of the reserves. The Commission does not concede that to be the fact for the reasons set forth in the memorandum filed with you today. I do not think that that is a point

111 of such overwhelming weight that it will cause your Honor to decide one way or the other, but I did want your Honor to take into consideration that had we come



here to present the matter on the motion for preliminary injunction we would have had sworn testimony with respect to that matter. The only difference between us is as to the percentage of total reserves that these reserves represent, and the effect of the life of the pipe line.

The COURT. Well, is that difference crucial?

Mr. TARVER. In my opinion, sir, it is a matter only of degree. I don't think that it will affect your Honor's ultimate decision.

120

*Reply of Mr. Traver.*

Mr. TARVER.

122

Judge Patterson said we would agree that there was constant trading in gas leases. Of course there is constant trading in gas leases. Companies switch leases according to their mutual advantages, but I submit that it is for the Commission to determine whether or not transfer of leases to this extent, to this magnitude, constitutes what amounts to a prejudice to the customers of Panhandle.

The COURT. Have you ever attempted before to police the industry in this fashion?

Mr. TARVER. No. This is the first time we have been faced with the problem. It is the first which has been presented to us in this way.

129

In United States District Court  
*Affidavit of William G. Maguire*

State of Delaware. }  
County of New Castle. } ss.:

WILLIAM G. MAGUIRE, being first duly sworn, deposes and says:

I am the Chairman of the Board of Panhandle Eastern Pipe Line Company.

I have read the affidavit of Edward L. Dunn filed in this cause and I deny that I made the following statement contained therein, "that the Hugoton Production Company had been organized by Panhandle because the Federal Power Commission had placed the valuable gas reserves of Panhandle in Panhandle's rate base, thereby preventing Panhandle from realizing the full value of said reserves,

and that the assignment of gas reserves to Hugoton Production Company and the proposed operation plan of Hugoton Production Company had resulted from careful studies made for the purpose of avoiding regulations of the earnings from the sale of gas produced and gathered from said gas reserves; that if the Federal Power Commission persisted in its present rate fixing methods and procedures, Panhandle might form other production companies similar to Hugoton Production Company which company represented only the start of Panhandle's endeavor to realize additional and unregulated profits for its stockholders from its gas reserves."

The inference to be derived from the statement incorrectly attributed to me by Mr. Dunn is that the primary objective for the formation of Hugoton Production Company and the assignment of the gas leases to it was to avoid Federal Power Commission regulation. Such is not the fact. This program was evolved as a result of negotiations between Panhandle Eastern Pipe Line Company and The Kansas Power and Light Company as being the most mutually satisfactory method, from an operating standpoint, of supplying an adequate quantity of gas produced in Kansas for the people of Kansas.

Panhandle Eastern Pipe Line Company has no plans for forming other production companies similar to Hugoton Production Company. It is to be borne in mind that Panhandle has more than \$100,000,000 investment in transmission facilities. In my opinion, the Board of Directors will continue to protect Panhandle's huge investment in such transmission facilities by maintaining an adequate gas reserve.

I further deny that either I or Mr. Byrd stated to Mr. Dunn as set forth in this affidavit that "the market price of said stock would soon be at least \$20 a share."

WILLIAM G. MAGUIRE:

Sworn to before me this  
21st day of November, 1948.  
Elizabeth O'Neill.

131 In United States District Court

*Memorandum*

The complaint and the moving papers (considering also defendant's papers) do not show any basis for the relief sought by plaintiff. Accordingly, an order denying plain-

tiff's motion for a preliminary injunction will be entered on the expiration of the outstanding restraining order, i. e., December 1, 1948. Defendant may submit proposed findings and conclusions in accordance with Rule 52(a) of the Rules of Civil Procedure.

(s) PAUL LEAHY,  
Ch. J.

Dated: November 26, 1948.

In United States District Court

*Answer of Intervener, Gregory B. Smith*

Intervener, GREGORY B. SMITH, by his attorney, ARTHUR G. CONNOLLY, answering the complaint herein, respectfully alleges and shows to this court:

1. Upon information and belief, denies each and every allegation contained in paragraphs "I", "XVI" and "XVIII" of the complaint.

2. Denies each and every allegation contained in paragraph "V" of the complaint except admits that defendant, Panhandle Eastern Pipe Line Company (hereinafter referred to as "Panhandle"), owns and operates, and at all times mentioned in the complaint, owned and operated, an integrated natural-gas pipe line system originating in the Hugoton natural-gas field of Kansas, Oklahoma and Texas and the Panhandle natural-gas field of Texas, and extending across the States of Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and into the State of Michigan; and that, by means of such system, defendant Panhandle, pursuant to contracts obligating it so to do, and on file with the Federal Power Commission as rate schedules under the Natural-Gas Act, supplies gas to distributing companies along the route thereof serving in excess of 1,500,000 customers.

3. Denies each and every allegation contained in paragraph "VII" of the complaint except admits that on September 22, 1948, Hugoton Production Company (hereinafter referred to as "Hugoton"), a Delaware corporation, was organized and that it has an authorized capital stock consisting of 1,500,000 shares of \$1.00 par value.

4. Denies each and every allegation contained in paragraph "VIII" of the complaint except admits that on or shortly before October 11, 1948, defendant, Panhandle, and Hugoton, entered into a contract whereby Hugoton agreed to issue 810,000 shares of its stock to Panhandle, and Pan-

handle agreed, in consideration thereof, to pay to Hugoton the sum of \$675,000.00 in cash and to transfer, assign and convey to Hugoton the oil and gas leases and gas leases covering 96,164.21 acres located in Grant and Stevens

133 Counties, Kansas, in the Hugoton natural-gas filed, together with certain oil leases covering 640 additional acres; and that it was further understood and agreed between Panhandle and Hugoton that Hugoton would promptly proceed to develop the acreage to be transferred to it and attempt to negotiate sales of gas therefrom to purchasers other than Panhandle; and that it was further agreed that beginning on January 1, 1965, Panhandle would have the option to purchase all gas produced from said leases at such price as Hugoton could then obtain from others; and that the parties contemplated that under expected rates of withdrawal of gas from the leases transferred to Hugoton during the period to 1965, Hugoton would produce and sell approximately 300 billion cubic feet of gas.

5. Denies each and every allegation contained in paragraph "IX" of the complaint except admits that on October 11, 1948, pursuant to the last-mentioned agreement, Hugoton issued the 810,000 shares of its stock to Panhandle; and that the sum of \$675,000 in cash was paid by Panhandle to Hugoton and that the aforementioned leases were transferred, assigned and conveyed by Panhandle to Hugoton.

6. Denies each and every allegation contained in paragraph "X" of the complaint except admits that said 810,000 shares of stock comprise all of the outstanding stock of Hugoton; that all of the officers and directors of Hugoton are officers and directors of Panhandle; and that Hugoton has no executive officers or employees who are not also executive officers and employees of Panhandle.

134 7. Denies each and every allegation contained in paragraph "XI" of the complaint except admits that on October 11, 1948, the Board of Directors of Panhandle declared a dividend in kind at the rate of one-half share of the capital stock of Hugoton for each of the 1,620,000 outstanding shares of common stock of Panhandle.

8. Denies each and every allegation contained in paragraph "XII" of the complaint except admits that on October 26, 1948, the Commission issued an order *In the Matter of Panhandle Eastern Pipe Line Company, Docket No. 6-1147*, a copy of which is attached to the complaint herein.



as Exhibit A, instituting an investigation of the facts and circumstances involved in the formation and proposed operation of Hugoton and the transfer to Hugoton by Panhandle of the Hugoton natural-gas reserves above-mentioned; that on November 10, 1948, the Commission issued another order in the same matter, a copy of which is attached to the complaint; that by said order, among other things, the Commission purported to require Panhandle and Hugoton to show cause at a public hearing scheduled for January 24, 1949, why the Commission should not by order find, determine and direct

(i) That Panhandle and Hugoton cancel the contract referred to in paragraph 4 hereof and that Panhandle return to Hugoton the aforesaid 810,000 shares of capital stock of Hugoton and cause Hugoton to return to Panhandle the leases on the 96,164.21 acres referred to in paragraph 4 hereof, together with the \$675,000.00 in cash received by Hugoton as aforesaid from Panhandle.

(ii) That Panhandle be prohibited from again transferring, assigning or conveying such leases without the consent of the Commission being first had and obtained.

(iii) That Panhandle refrain from paying to its stockholders, as a dividend or otherwise, such 810,000 shares of the capital stock of Hugoton and refrain from transferring the title to such shares of stock to such stockholders or to any person other than Hugoton.

9. Upon information and belief, denies each and every allegation contained in paragraph "XIII" of the complaint except admits that in said order of November 10, 1948, the Commission purported to require that, pending final determination by the Commission of the questions to be presented at such January 24, 1949 hearing, Panhandle refrain from paying to its stockholders, as a dividend or otherwise, its 810,000 shares of the capital stock of Hugoton; and that the Commission further purported to require in said order that Panhandle cause Hugoton to refrain from transferring, assigning or conveying the above-mentioned leases or any of them, to any person, and from issuing or transferring any of its capital stock to any person and, pending final determination by the Commission of the questions presented at the hearing, that Hugoton refrain from transferring, assigning or conveying the above-

136 mentioned leases, or any of them, to any person and from issuing or transferring any of its capital stock to any person.

10. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "XIV" of the complaint.

11. Upon information and belief, denies each and every allegation contained in paragraph "XVII" of the complaint except denies any knowledge or information sufficient to form a belief as to the truth of the allegations that the delay rentals, renewal bonus payments and other exploitation and development costs relating to the aforesaid natural-gas leases included by the Commission in Panhandle's operating revenue deductions in the rate proceedings referred to in Paragraph (c) of the Commission's order of November 10, 1948, amount to a sum in excess of \$665,000.00, and that the total estimated capital cost of the "Group A", "Group B" and "Group C" facilities authorized by the Commission for the purpose of enlarging Panhandle's system referred to in Paragraphs (d) to (k), inclusive, of said order of November 10, 1948, is \$56,998,550.

AS AND FOR A SEPARATE AND DISTINCT DEFENSE TO THE  
COMPLAINT HEREIN

12. That on or about October 29, 1948, Panhandle ceased to be the owner of the 810,000 shares of the capital stock of Hugoton and 500 of said shares at said time became the property of the intervenor.

13. That since October 29, 1949, the Federal Power  
B37 Commission and this Court have been without any jurisdiction or right to interfere with the intervenor's ownership, possession, control and disposition of said 500 shares of Hugoton stock or to cause to be withheld from the intervenor the certificates evidencing his ownership of said 500 shares of Hugoton stock.

14. That the Commission's aforesaid order of November 10, 1948, and this court's temporary restraining order of November 13, 1948, as continued by its order of November 22, 1948, unreasonably deprive intervenor of his property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

15. That if this court should grant the injunction as prayed for in the complaint or should continue its temporary restraining order of November 13, 1948, great and irreparable injury would be caused to the intervenor herein and the other similarly situated stockholders of Hugoton and of Panhandle.

WHEREFORE, intervenor, GREGORY B. SMITH, prays:

1. That this Court's temporary restraining order of November 13, 1948, be dissolved forthwith;
2. That the complaint herein be dismissed;
3. That intervenor have such other and further relief as to the Court may seem just.

ARTHUR G. CONNALLY,  
*Attorney for Intervenor,*  
228 Delaware Trust Building,  
Wilmington 28, Delaware.

SMITH & MCINERNEY, of Counsel,  
Office and Post Office Address,  
1 East 57th Street,  
New York 22, N. Y.

Dated: November 23, 1948.

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In United States District Court

*Answer of Interveners, Stephen Carlton  
Clark, et al.*

Interveners, STEPHEN CARLTON CLARK, FREDERICK AMBROSE CLARK, SUSAN VANDERPOEL CLARK, FLORENCE L. S. CLARK, STEPHEN CARLTON CLARK, JR., ALFRED CORNING CLARK, HENRY R. LABOUISSSE, JR., PAUL S. KERR, MARTHA H. KERR, WATSON BEACH DAY, LILLIAN W. DAY, MARY COBB LOWE, ELEANOR S. DOOLITTLE, ELINOR D. JOHNSTON, ELSIE G. PENDLETON, CHARLES E. MAIN, LAURA S. MAEN, KENNETH A. MAIN, individually, and FREDERICK AMBROSE CLARK and WATSON BEACH DAY, as Trustees under Deed of Trust made by Frederick Ambrose Clark dated June 19, 1918, WALTER C. FLANDERS and WATSON BEACH DAY, as Trustees under Deed of Trust made by Stephen Carlton Clark dated June 26, 1917, WATSON BEACH DAY and STEPHEN CARLTON CLARK, as Trustees under Deed of Trust made by Stephen Carlton Clark dated October 15, 1919, under Deed of Trust made by Stephen Carlton Clark dated April 26, 1932, under Deed of Trust made by Stephen Carlton Clark dated August 5, 1935, under Deed of Trust made by Alfred Corning Clark dated August 27, 1942, under Deed of Trust made by Frederick Ambrose Clark dated June 6, 1944, under Deed of Trust made by Frederick Ambrose Clark dated June 29, 1944, and as surviving Trustees under Deed of Trust made by Stephen Carlton Clark, Edward S. Clark, Robert S. Clark and Frederick Ambrose Clark dated May 18, 1947, CHARLES

E. MAIN and WATSON BEACH DAY, as Trustees under Deeds of Trust made by Stephen Carlton Clark for Stephen Carlton Clark, Jr. and Alfred Corning Clark dated June 139 5, 1940, WATSON BEACH DAY and PAUL S. KERR, as Trustees under Deed of Trust made by Stephen Carlton Clark, Jr., dated July 13, 1943, WATSON BEACH DAY, CHARLES E. MAIN and PAUL S. KERR, as Trustees under Deed of Trust made by Stephen Carlton Clark dated May 10, 1946, and THE CLARK FOUNDATION, THE SCRIVEN FOUNDATION, INC. and THE MARY IMOGENE BASSETT HOSPITAL, all being membership corporations organized and existing under the Membership Corporations Law of the State of New York, and LEATHER STOCKING CORPORATION, a corporation organized and existing under the laws of the State of New York, by their attorneys, Richards, Layton and Finger, answering the complaint herein respectfully allege:

1. Upon information and belief interveners deny each and every allegation contained in Paragraph I of the complaint.

2. Interveners admit the allegations contained in Paragraphs II, III, IV of the complaint.

3. Answering the allegations of Paragraph V of the complaint, interveners admit that defendant, Panhandle Eastern Pipe Line Company (hereinafter referred to as "Panhandle"), owns and operates, and at all times mentioned in the complaint, owned and operated, an integrated natural-gas pipe line system originating in the Hugoton natural-gas field of Kansas, Oklahoma and Texas and the Panhandle natural-gas field of Texas, and extending across the States of Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and into the State of Michigan; and that, by means of such system, defendant Panhandle, pursuant to contracts 140 obligating it so to do, and on file with the Federal

Power Commission as rate schedules under the Natural-Gas Act, supplies gas to distributing companies along the route thereof serving in excess of 1,500,000 customers. Except as herein expressly admitted, interveners deny each and every allegation contained in Paragraph V of the complaint.

4. Interveners admit the allegations contained in Paragraph VI of the complaint.

5. Answering the allegations of Paragraph VII of the complaint, interveners admit that on September 22, 1948, Hugoton Production Company (hereinafter referred to as "Hugoton"), a Delaware corporation, was organized and that it has an authorized capital stock consisting of 1,500,000



shares of \$1.00 par value. Except as herein expressly admitted, interveners deny each and every allegation contained in Paragraph VII of the complaint.

6. Answering the allegations of Paragraph VIII of the complaint, interveners admit that on or shortly before October 11, 1948, defendant, Panhandle, and Hugoton entered into a contract whereby Hugoton agreed to issue 810,000 shares of its stock to Panhandle, and Panhandle agreed, in consideration thereof, to pay to Hugoton the sum of \$675,000.00 in cash and to transfer, assign and convey to Hugoton the oil and gas leases and gas leases covering 96,164.21 acres located in Grant and Stevens Counties, Kansas, in the Hugoton natural-gas field, together with certain oil leases covering 640 additional acres; and that it

141 was further understood and agreed between Panhandle and Hugoton that Hugoton would promptly proceed to develop the acreage to be transferred to it and attempt to negotiate sales of gas therefrom to purchasers other than Panhandle; and that it was further agreed that beginning on January 1, 1965, Panhandle would have the option to purchase all gas produced from said leases at such price as Hugoton could then obtain from others; and that the parties contemplated that under expected rates of withdrawal of gas from the leases transferred to Hugoton during the period to 1965, Hugoton would produce and sell approximately 300 billion cubic feet of gas. Except as herein expressly admitted, interveners deny each and every allegation contained in Paragraph VIII of the complaint.

7. Answering the allegations of Paragraph IX of the complaint, interveners admit that on October 11, 1948, pursuant to the last-mentioned agreement, Hugoton issued the 810,000 shares of its stock to Panhandle; and that the sum of \$675,000 in cash was paid by Panhandle to Hugoton and that the aforementioned leases were transferred, assigned and conveyed by Panhandle to Hugoton. Except as herein expressly admitted, interveners deny each and every allegation contained in Paragraph IX of the complaint.

8. Answering the allegations of Paragraph X of the complaint, interveners admit that said 810,000 shares of stock comprise all of the outstanding stock of Hugoton; that all of the officers and directors of Hugoton are officers and directors of Panhandle; and that Hugoton has no executive officers or employees who are not also executive officers and employees of Panhandle. Except as herein expressly admitted, interveners deny each

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and every allegation contained in Paragraph X of the complaint.

9. Answering the allegations of Paragraph XI of the complaint, interveners admit that on October 11, 1948, the Board of Directors of Panhandle declared a dividend in kind at the rate of one-half share of the capital stock of Hugoton for each of the 1,620,000 outstanding shares of common stock of Panhandle. Except as herein expressly admitted, interveners deny each and every allegation contained in Paragraph XI of the complaint.

10. Answering the allegations of Paragraph XII of the complaint, interveners admit that on October 26, 1948, the Commission issued an order *In the Matter of Panhandle Eastern Pipe Line Company, Docket No. 6-1147*, a copy of which is attached to the complaint herein as Exhibit A, instituting an investigation of the facts and circumstances involved in the formation and proposed operation of Hugoton and the transfer to Hugoton by Panhandle of the Hugoton natural-gas reserves above-mentioned; that on November 10, 1948, the Commission issued another order in the same matter, a copy of which is attached to the complaint; that by said order, among other things, the Commission purported to require Panhandle and Hugoton to show cause at a public hearing scheduled for January 24, 1949, why the Commission should not by order find, determine and direct

143 (i) That Panhandle and Hugoton cancel the contract referred to in paragraph 4 hereof and that Panhandle return to Hugoton the aforesaid 810,000 shares of capital stock of Hugoton and cause Hugoton to return to Panhandle the leases of the 96,164.21 acres referred to in paragraph 4 hereof, together with the \$675,000.00 in cash received by Hugoton as aforesaid from Panhandle.

(ii) That Panhandle be prohibited from again transferring, assigning or conveying such leases without the consent of the Commission being first had and obtained.

(iii) That Panhandle refrain from paying to its stockholders, as a dividend or otherwise, such 810,000 shares of the capital stock of Hugoton and refrain from transferring the title to such shares of stock to such stockholders or to any person other than Hugoton.

Except as herein expressly admitted, interveners deny each and every allegation contained in Paragraph XII of the complaint.

11. Answering the allegations of Paragraph XIII of the complaint, interveners admit that in said order of November 10, 1948, the Commission purported to require that, pending final determination by the Commission of the questions to be presented at such January 24, 1949 hearing, Panhandle refrain from paying to its stockholders, as a dividend or otherwise, its ~~5~~10,000 shares of the capital stock of Hugoton; and that the Commission further purported to require in said order that Panhandle cause

Hugoton to refrain from transferring, assigning or conveying the above-mentioned leases, or any of them to any person, and from issuing or transferring any of its capital stock to any person and, pending final determination by the Commission of the questions presented at the hearing, that Hugoton refrain from transferring, assigning or conveying the above-mentioned leases, or any of them to any person and from issuing or transferring any of its capital stock to any person. Except as herein expressly admitted, interveners deny each and every allegation contained in Paragraph XIII of the complaint.

12. Intervenors deny that they have knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph XIV of the complaint.

13. Intervenors admit the allegations contained in Paragraph XV of the complaint.

14. Upon information and belief interveners deny each and every allegation contained in Paragraph XVI of the complaint.

15. Answering the allegations of Paragraph XVII of the complaint, interveners deny any knowledge or information sufficient to form a belief as to the truth of the allegations that the delay rentals, renewal bonus payments and other exploitation and development costs relating to the aforesaid natural-gas leases included by the Commission in Panhandle's operating revenue deductions in the rate proceedings referred to in Paragraph (c) of the Commission's order of November 10, 1948, amount to a sum in excess of \$665,000, and that the total estimated capital cost of the "Group A", "Group B" and "Group C" facilities authorized by the Commission for the purpose of enlarging Panhandle's system referred to in Paragraphs (d) to (k), inclusive, of said order of November 10, 1948, is \$56,998,550. Except as therein expressly stated interveners upon information and belief deny each and every allegation contained in Paragraph XVII of the complaint.

16. Upon information and belief interveners deny each and every allegation contained in Paragraph XVIII of the complaint.

#### FIRST DEFENSE

17. On or about October 29, 1948, Panhandle ceased to be the owner of any of the shares of the capital stock of Hugoton.

18. On October 29, 1948, the stockholders of Panhandle of record on that day became the owners of the 810,000 shares of the Capital stock of Hugoton and interveners thereupon became the owners of an aggregate of 65,314 shares of the capital stock of Hugoton and became entitled to certificates evidencing said ownership.

19. Since October 29, 1948, the Federal Power Commission and this court have been without jurisdiction over the transactions complained of in the complaint and neither the Federal Power Commission nor this court has any jurisdiction or right to cause to be withheld from the interveners the certificates evidencing their ownership of their shares of Hugoton stock.

146 20. The Commission's aforesaid order of November 10, 1948, and this court's original temporary restraining order of November 13, 1948, as continued by its order of November 22, 1948, unreasonably deprived interveners of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

21. If this court should grant the injunction as prayed for in the complaint, great and irreparable injury would be caused to interveners herein, and interveners would be unreasonably deprived of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and this court has no power under Article III, Section 2 of the Constitution of the United States to grant such relief.

WHEREFORE interveners, STEPHEN CARLTON CLARK, *et al.* pray:

- (1) That the complaint herein be dismissed;
- (2) That interveners have such other and further relief as to the court may seem just.

RICHARD, LAYTON & FINGER,  
Attorneys for Petitioners.  
4072 Du Pont Building,  
Wilmington, Delaware.



WINTHROP, STIMSON, PUTNAM & ROBERTS, of Counsel,  
32 Liberty Street,  
New York, New York.  
Dated: Nov. 29, 1948.

147 In United States District Court  
*Stipulation Amending Complaint*

IT IS HEREBY STIPULATED AND AGREED by and between the Attorneys for the Plaintiff, the Defendant, and the Intervenor, that the Bill of Complaint filed herein be amended by deleting the period at the end of Paragraph (1) of the Complaint and placing a comma in its stead, and by adding the following: "and under the general equity powers of this Honorable Court."

WILLIAM MARVEL,  
*United States Attorney,  
Attorney for Plaintiff.*

E. ENNALLS BERL,  
*Attorney for Defendant.*

ARTHUR G. CONNOLLY,  
*Attorney for Intervenor,  
Gregory E. Smith.*

CALEB S. LAYTON,  
*Attorney for Intervenor,  
Stephen Carlton Clark,  
et al.*

SO ORDERED this 30th  
day of November, 1948.  
Paul Leahy.

148 In United States District Court  
*Findings of Fact and Conclusions of Law*

This cause came on to be heard on the plaintiff's motion for a preliminary injunction and the defendant's motion to dissolve the temporary restraining order obtained by the plaintiff without notice, and the Court having considered the complaint, as amended, and the moving papers and the affidavits of the plaintiff and the moving papers, as amended, and the affidavits of the defendant, and having heard argument of the parties in open court and considered the points and authorities submitted by them, finds the facts and states the conclusions of law as follows:

### *Findings of Fact*

1. Plaintiff, Federal Power Commission (hereinafter sometimes referred to as "the Commission"), is an agency of the United States charged with the duty of administering the Natural Gas Act, as amended.

2. Defendant, Panhandle Eastern Pipe Line Company (hereinafter sometimes referred to as "Panhandle"), is a Delaware corporation which owns or controls natural gas production properties in the states of Kansas, Oklahoma and Texas, and operates a pipe line system extending from Texas through Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and into Michigan.

3. Hugoton Production Company (hereinafter sometimes referred to as "Hugoton") is a Delaware corporation which

Panhandle caused to be organized in September, 1948.

149 4. On October 11, 1948, pursuant to a written agreement of the same date, Panhandle purchased and acquired from Hugoton 810,000 shares of common stock of Hugoton in consideration of the sum of \$675,000 in cash and the conveyance by Panhandle to Hugoton of all of Panhandle's right, title and interest in and to gas leases (and some oil leases) on approximately 97,000 acres of undeveloped land located in Grant and Stevens Counties, Kansas, with Panhandle retaining the option to purchase on and after January 1, 1965 all or any specified portion of the gas produced from such acreage. Such acreage is wholly undeveloped and is not connected with any existing pipe line system.

5. The gas reserves under the leases transferred by Panhandle to Hugoton are estimated to be approximately 700 billion cubic feet. Under date of October 18, 1948, Hugoton entered into a contract with Kansas Power and Light Company providing for the sale by Hugoton to said Kansas Power and Light Company for the period of 15 years from November 1, 1949 to November 1, 1964 of gas to be produced by Hugoton from such leases. A copy of said contract was received by the Court as a part of the defendant's moving papers. Said contract provides, among other things, that all volumes of natural gas covered thereby are to be produced from wells located in the State of Kansas and Kansas Power and Light Company agrees that said gas is to be consumed by it or sold by it for consumption wholly within the State of Kansas. The total volume of gas to be sold by Hugoton to Kansas Power and Light

150. Company for the entire period of said contract is estimated to amount to 300 billion cubic feet. Panhandle asserts it still owns or controls, after the transfer of such leases to Hugoton, over 6,000 billion (6 trillion) cubic feet of gas, or more than enough gas reserves to serve its entire system, including facilities authorized but not yet constructed, for more than 25 years, but this is not conceded by plaintiff.

6. In 1946 and 1947, Panhandle applied to the Commission under Section 7 of the Natural Gas Act for certificates of convenience and necessity with respect to the proposed enlargement of its pipe line system by the construction of Group "A", Group "B" and Group "C" facilities. In presenting to the Commission, on those applications, evidence of its gas reserves, Panhandle included as a part of its total gas reserves acreage subsequently transferred on October 11, 1948 to Hugoton. The Certificates applied for were granted by the Commission on June 4, 1946, November 30, 1946 and June 10, 1948.

7. Panhandle asserts the gas reserves which it now owns or controls are greater than those which Panhandle owned or controlled when it applied for the Group "A" and Group "B" facilities; and the gas reserves which Panhandle now owns or controls are less than those which Panhandle owned or controlled when it applied for the Group "C" facilities, but the amount of the decrease is not material. But plaintiff does not concede these assertions. Construction of the Group "C" facilities has not yet commenced.

8. It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases.

9. Acreage transferred by Panhandle to Hugoton on October 11, 1948 was therefore included in Panhandle's rate base, and delay rentals, renewal bonus payments and other exploration and development costs relating to such acreage, were included in Panhandle's operating revenue deductions.

10. On October 11, 1948, the Board of Directors of Panhandle declared a dividend to the holders of the common stock of Panhandle, payable in common stock of Hugoton at the rate of one-half share for each share of common stock of Panhandle, said dividend comprising the entire 810,000 shares of common stock of Hugoton acquired by

Panhandle and all of the outstanding stock of Hugoton. Said dividend was declared to be payable November 17, 1948 to stockholders of record October 29, 1948.

11. On October 29, 1948, Panhandle delivered to United States Corporation Company, the transfer agent for Hugoton stock, a certificate representing 810,000 shares of common stock of Hugoton registered in the name of Panhandle and endorsed in blank and, pursuant to the directions of Panhandle, said United States Corporation Company caused said shares of stock to be transferred 152 to the names of the stockholders of record of Panhandle on October 29, 1948, caused Federal stock transfer stamps to be affixed and cancelled, and made out new certificates in the names of such persons and inserted the same in envelopes ready to mail, intending to mail said certificates on November 15 and November 16, 1948.

12. The common stock of Panhandle, which is listed on the New York Stock Exchange, became "ex-dividend" on October 29, 1948. The stock of Hugoton was widely traded in the "over the counter" market on a "when, as, and if" basis, starting on or about October 13, 1948.

13. On October 26, 1948, the Commission issued an order instituting an investigation of the facts and circumstances involved in the formation and proposed operation of Hugoton and the transfer to Hugoton by Panhandle of the gas leases above mentioned.

14. On November 10, 1948, the Commission entered a supplementary order joining Hugoton in the proceeding; setting the matter for hearing on January 24, 1949; directing the responding companies to show cause why the Commission should not direct Panhandle and Hugoton to cancel the transfer of said gas leases from Panhandle to Hugoton and the issuance of the capital stock of Hugoton to Panhandle, prohibit Panhandle from again transferring said leases without the prior consent of the Commission, and direct Panhandle to refrain from transferring said capital stock of Hugoton by way of dividend or otherwise; and directing maintenance of the *status quo* pending such determination.

153 15. On November 13, 1948, the Commission instituted this suit seeking to enforce its direction to maintain the *status quo* by injunctive relief, and applied for a preliminary injunction and for a temporary restraining order. To this end the Commission filed a verified complaint and a motion for a preliminary injunction, there be-



ing attached in support thereof, the affidavit sworn to November 12, 1948, of Edward L. Dunn, Examiner of Accounts for the Commission, and other exhibits.

16. On November 13, 1948, the Court, on the basis of the Commission's said verified complaint and moving papers issued a temporary restraining order enjoining Panhandle from (a) paying to its stockholders the dividend consisting of 810,000 shares of the capital stock of Hugoton, (b) delivering such shares of stock to such stockholders, (c) transferring the title to said shares of stock to said stockholders or others, and requiring Panhandle to cause Hugoton to refrain from transferring the gas leases and from issuing or transferring any capital stock.

17. On November 16, 1948, Panhandle filed with the Court its motion to dissolve the temporary restraining order together with the affidavit sworn to November 16, 1948, of Hy Byrd, Vice President and Treasurer of Panhandle and Treasurer of Hugoton, in support thereof.

18. On November 18, 1948, on the consent of the parties, the Court held a consolidated hearing on the Commission's motion for a preliminary injunction and Panhandle's motion to dissolve the temporary restraining order.

19. At said hearing on November 18, 1948, the Commission moved to amend its complaint "so as to invoke the jurisdiction of this Court on the additional ground of its equity powers," and on the consent of Panhandle, said motion was granted.

20. At said hearing on November 18, 1948 Panhandle moved to amend its motion to dissolve the temporary restraining order so as to include as a basis for requesting such relief the ground "that the complaint and moving papers show no ground for the issuance of the temporary restraining order," and on the consent of the Commission, said motion was granted.

21. At said hearing on November 18, 1948, the Court accepted the additional affidavit of Edward L. Dunn sworn to November 17, 1948 submitted by the Commission. On November 22, 1948 the Court accepted the affidavit of William G. Maguire, Chairman of the Board of Panhandle, sworn to November 21, 1948, submitted by Panhandle in reply to said affidavit of Edward L. Dunn.

22. On November 22, 1948 the Court ordered that said restraining order be extended to December 1, 1948.

23. On November 24, 1948, Gregory B. Smith, applied for leave to intervene as a defendant in this action, alleging

155 himself to be the holder of 1,000 shares of common stock of Panhandle and 500 shares of common stock of Hugoton. Said application has been granted.

24. On November 29, 1948, Stephen Carlton Clark, Frederick Ambrose Clark, Susan Vanderpoel Clark, Florence L. S. Clark, Stephen Carlton Clark, Jr., Alfred Corning Clark, Henry R. Labouisse, Jr., Paul S. Kerr, Martha H. Kerr, Watson Beach Day, Lillian W. Day, Mary Cobb Lowe, Eleanor S. Doolittle, Elinor D. Johnston, Elsie G. Pendleton, Charles E. Main, Laura S. Main, Kenneth A. Main, individually and Frederick Ambrose Clark and Watson Beach Day, as Trustees under Deed of Trust made by Frederick Ambrose Clark dated June 19, 1918, Walter C. Flanders and Watson Beach Day, as Trustees under Deed of Trust made by Stephen Carlton Clark dated June 26, 1917, Watson Beach Day and Stephen Carlton Clark, as Trustees under Deed of Trust made by Stephen Carlton Clark dated October 15, 1919, under Deed of Trust made by Stephen Carlton Clark dated April 26, 1932, under Deed of Trust made by Stephen Carlton Clark dated August 3, 1935, under Deed of Trust made by Alfred Corning Clark dated August 27, 1942, under Deed of Trust made by Frederick Ambrose Clark dated June 6, 1944, under Deed of Trust made by Frederick Ambrose Clark dated June 29, 1944, and as surviving Trustees under Deed of Trust made by Stephen Carlton Clark, Edward S. Clark, Robert S. Clark and Frederick Ambrose Clark dated May 18, 1917, Charles E. Main and Watson Beach Day, as Trustees under Deeds of Trust made by Stephen Carlton Clark for Stephen Carlton Clark, Jr. and Alfred Corning Clark dated June 5, 156 1940, Watson Beach Day and Paul S. Kerr, as Trustees under Deed of Trust made by Stephen Carlton Clark, Jr., dated July 13, 1943, Watson Beach Day, Charles E. Main and Paul S. Kerr, as Trustees under Deed of Trust made by Stephen Carlton Clark dated May 10, 1946, and The Clark Foundation, The Scriven Foundation, Inc., and The Mary Imogene Bassett Hospital, all being membership corporations organized and existing under the Membership Corporation Law of the State of New York, and Leatherstocking Corporation, a corporation organized and existing under the laws of the State of New York, applied for leave to intervene as defendants in this action, alleging themselves to be the holders of 130,628 shares of common stock of Panhandle and 65,314 shares of common stock of Hugoton. Said application has been granted.

### *Conclusions of Law*

1. The complaint and the moving papers (considering also defendant's papers) as amended, do not show any basis for the relief sought by plaintiff.

2. An order denying plaintiff's motion for a preliminary injunction should be entered and the outstanding restraining order should expire by its own terms on December 1, 1948.

Wilmington, Delaware, November 30, 1948.

(s) PAUL LEAHY,  
Ch. J.

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### In United States District Court

#### *Order Denying Motion for Preliminary Injunction—Nov. 30, 1948*

Plaintiff having moved herein on November 13, 1948 for a preliminary injunction against the defendant Panhandle Eastern Pipe Line Company, enjoining said defendant, its officers, agents, representatives and employees, from paying to its stockholders as a dividend 810,000 shares of the capital stock of Hugoton Production Company, from delivering to such stockholders certificates for such 810,000 shares, and from transferring the title to such shares of stock to such stockholders, or to any other person, and requiring said defendant to cause Hugoton Production Company to refrain from transferring, assigning or conveying certain gas leases to any person and from issuing and transferring any of its capital stock to any person, and for a temporary restraining order, pending the determination of such motion, and the Court having on November 13, 1948 issued a temporary restraining order directing that until November 23, 1948, said defendant Panhandle Eastern Pipe Line Company, its officers, agents, representatives and employees be temporarily restrained and enjoined from doing such acts, and that said defendant be temporarily required to cause Hugoton Production Company to refrain from such acts, and said temporary restraining

158 ing order having subsequently, i. e., on November 22, 1948, been continued by the Court to December 1, 1948, and said defendant Panhandle Eastern Pipe Line Company having moved on November 16, 1948, that said temporary restraining order be dissolved, and said motions

having been consolidated for hearing on the consent of the parties and having duly come on to be heard on November 18, 1948, and the Court having read and filed and considered the verified complaint, as amended, and the moving papers and affidavits of the plaintiff, in support of the plaintiff's said motion and in opposition to the defendant's said motion, and the moving papers, as amended, and affidavits of the defendant, in support of the defendant's said motion and in opposition to the plaintiff's said motion, and William Marvel, Esq., having appeared for the plaintiff, in support of the plaintiff's said motion and in opposition to the defendant's said motion, with William S. Tarver, Esq., and Howell Purdue, Esq., of counsel, and E. Ennalls Berl, Esq., having appeared for the defendant Panhandle Eastern Pipe Line Company, in support of the defendant's said motion and in opposition to the plaintiff's said motion, with Robert P. Patterson, Esq., of counsel, and the Court having heard the arguments of said counsel and considered the points and authorities submitted by them, and having heard the arguments of Carl F. Farbach, Esq., Kevin McInerney, Esq., James A. Austin, Esq., George S.

159 Munson, Esq., and Gerard Smith, Esq., as *amici curiae* on behalf of stockholders of Hugoton Production Company, in support of the defendant's said motion and in opposition to the plaintiff's said motion, and Gregory B. Smith, Stephen Carlton Clark, Frederick Ambrose Clark, Susan Vanderpoel Clark, Florance L. S. Clark, Stephen Carlton Clark, Jr., Alfred Corning Clark, Henry P. Labouisse, Jr., Paul S. Kerr, Martha H. Kerr, Watson Beach Day, Lillian W. Day, Mary Cobb Lowe, Eleanor S. Doblittle, Elinor D. Johnston, Elsie G. Pendleton, Charles E. Main, Laura S. Main, Kenneth A. Main, individually and Frederick Ambrose Clark and Watson Beach Day, as Trustees under Deed of Trust made by Frederick Ambrose Clark dated June 19, 1918, Walter C. Flanders and Watson Beach Day, as Trustees under Deed of Trust made by Stephen Carlton Clark dated June 26, 1917, Watson Beach Day and Stephen Carlton Clark, as Trustees under Deed of Trust made by Stephen Carlton Clark dated October 15, 1919, under Deed of Trust made by Stephen Carlton Clark dated April 26, 1932, under Deed of Trust made by Stephen Carlton Clark dated August 5, 1935, under Deed of Trust made by Alfred Corning Clark dated August 27, 1942, under Deed of Trust made by Frederick Ambrose Clark dated June 6, 1944, under Deed of Trust made by Frederick



Ambrose Clark dated June 29, 1944, and as surviving Trustees under Deed of Trust made by Stephen Carlton Clark, Edward S. Clark, Robert S. Clark and Frederick

Ambrose Clark dated May 18, 1917, Charles E. Main and Watson Beach Day, as Trustees under Deeds of Trust made by Stephen Carlton Clark for Stephen Carlton Clark, Jr. and Alfred Corning Clark dated June 5, 1949, Watson Beach Day and Paul S. Kerr, as Trustees under Deed of Trust made by Stephen Carlton Clark, Jr., dated July 13, 1943, Watson Beach Day, Charles E. Main and Paul S. Kerr, as Trustees under Deed of Trust made by Stephen Carlton Clark dated May 10, 1946, and The Clark Foundation, The Scriven Foundation, Inc., and The Mary Imogene Bassett Hospital, all being membership corporations organized and existing under the Membership Corporation Law of the State of New York, and Leatherstocking Corporation, a corporation organized and existing under the laws of the State of New York, having made applications for leave to intervene as defendants and said applications having been granted, and the Court having made and filed its written opinion and findings of fact and conclusions of law, and due deliberation having been had; and as said temporary restraining order will expire on December 1, 1948, it is on motion of E. Ennalls Berl, Esq., attorney for defendant Panhandle Eastern Pipe Line Company,

ORDERED that the plaintiff's motion for a preliminary injunction be, and the same hereby is, in all respects denied, in accordance with the Memorandum filed by this Court in this cause on November 26, 1948.

(s) PAUL LEAHY  
Ch. J.

198 In the United States Circuit Court of Appeals  
For the Third Circuit

No. 9847

FEDERAL POWER COMMISSION,

*Plaintiff and Appellant.*

VS.

PANHANDLE EASTERN PIPE LINE COMPANY,  
a Corporation,

*Defendant and Respondent.*

*Order Fixing Time for Hearing on Appeal and Granting  
Stay Pending Appeal—Filed Nov. 30, 1948*

Present: Maris, Goodrich & Kalodner, JJ.

Upon reading and filing the verified petition of appellant, Federal Power Commission, for stay pending appeal, and good and sufficient reason appearing to me, therefore

IT IS HEREBY ORDERED that this cause shall be heard on appeal by this Court at 10:30 o'clock in the forenoon on December 21, 1948, or as soon thereafter as counsel can be heard, at the United States Court House, . . . . . Philadelphia, Pennsylvania.

IT IS FURTHER ORDERED that pending the hearing of this appeal and the further order of this Court, respondent, Panhandle Eastern Pipe Line Company, its officers, agents, representatives and employees, be and they hereby are (i) enjoined and restrained from paying to its common stockholders as a dividend the 810,000 shares of the capital stock of Hugoton Production Company referred to in said petition for stay, from delivering to such stockholders certificates for such 810,000 shares, and from transferring the title to such shares of stock to such stockholders or to any other person; and (ii) required to cause Hugoton Production Company, its officers, representatives, employees and agents, including its transfer agents, to refrain from transferring, assigning, or conveying the certain oil and gas leases and gas leases on 96,164.21 acres of land in Grant and Stevens Counties, Kansas, referred to in said petition, or any such leases, to any person, and from issuing or transferring any of its capital stock to any person, until the further order of this Court; and

199 IT IS FURTHER ORDERED that service of a copy of this order and of the petition for stay pending ap-

peal upon Messrs. Southerland, Berl & Potter, attorneys for respondent, by leaving a copy thereof at their office at Delaware Trust Building, Wilmington, Delaware, on November 30, 1948, shall be good and sufficient service hereof.

Dated at Philadelphia, Pennsylvania, November 30, 1948.

BY THE COURT,

MARIS,

*United States Circuit Judge.*

(File endorsement omitted)

201 In the United States Court of Appeals  
For the Third Circuit  
(Title omitted)

*Petition of the State Corporation Commission of the State  
of Kansas for Permission to Intervene—Filed  
Dec. 20, 1948*

(File endorsement omitted)

202 The State Corporation Commission of the State of Kansas respectfully moves this Honorable Court for permission to intervene in and be made a party to this appeal. It advances the following reasons in support of its motion.

### I

The State Corporation Commission of the State of Kansas (hereinafter, for convenience, referred to as the Corporation Commission) is by Chapter 55, Article 7 of the 1947 Supplement to the General Statutes of Kansas empowered to and under the provisions thereof does exercise jurisdiction over the production and marketing of natural gas within the State of Kansas.

### II

It is the duty of the Corporation Commission, under the statutes cited, to regulate the taking of natural gas to accomplish

- (a) The prevention of waste,
- (b) The protection of correlative rights, and
- (c) The orderly development in and of any common source of supply.

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### III

Under the authority conferred by the cited statutes, the Corporation Commission has issued a Basic Pro-

ration Order for the Kansas Hugoton Field, and it issues each month a monthly proration order regulating the production of natural gas from the Kansas Hugoton Field to accomplish the objective recited in Paragraph II. A copy of the Basic Proration Order and a sample monthly proration order will be furnished the Court for its convenience. It is thought unnecessary to make these orders a part of the record in this appeal.

#### IV

The Corporation Commission, by Chapter 66 of the General Statutes of Kansas, is charged with the regulation of public utilities within the State of Kansas to the end that sufficient and efficient public utility service will be rendered the people of the State of Kansas and that fair and reasonable rates will be charged for such service. The Kansas Power and Light Company, operating as a gas and electric public utility company within the State of Kansas, is subject to the utility regulatory jurisdiction of the Corporation Commission. The transaction sought here to be enjoined would, if the injunction is refused, result in a supply of natural gas being made available to the Kansas  
 204 Power and Light Company enabling the company to continue sufficient and efficient gas service to its 52,500 gas customers in Kansas. The company's presently available supply is sufficient to serve these customers only for four to five years in the future.

#### V

In addition to making available to the Kansas customers of the Kansas Power and Light Company a supply of gas for at least fifteen years in the future, the contract between the Kansas Power and Light Company and the Hugoton Production Company provided for a price of twelve cents per M. c. f. to be paid for the gas sold. This price is more nearly commensurate with the value of the gas than the price paid under most of the existing gas sale contracts applicable in the Kansas Hugoton Field and promotes the welfare of the natural gas industry in Kansas and the welfare of the people of Kansas.

#### VI

In the performance of its statutory duties with respect to natural gas and regulation of public utilities, the Corporation Commission has intervened in and been a party to numerous hearings before the Federal Power Commis-



sion. The Corporation Commission has consistently adhered to a policy of resisting all measures that conflict or tend to conflict with the efficient discharge of its statutory duties. It presently has on file a petition to intervene in Federal Power Commission Docket Number G-1147, entitled *In the Matter of Panhandle Eastern Pipe Line Company*. An order issued by the Federal Power Commission in Docket G-1147 on November 10, 1947, is the ground on which that commission based the instant proceeding.

## VII

The Corporation Commission has faced many difficult problems in its efforts to promote orderly development of the Kansas Hugoton Field. Several large purchasers of natural gas have sought to obtain large gas reserves within the Hugoton Field by securing gas leases from individual landowners or assignments of leases from individual lessees. Often the reserves secured by a particular purchaser are not advantageously located with respect to the transportation facilities available to it but are near the transportation facilities of another purchaser. Free trading of leases and production rights among the various purchasers to enable them economically to connect producing wells to pipeline facilities has resulted in the prompt production and utilization of gas as the wells are completed. This tends to eliminate unproduced prorated allowable production, facilitates regulation of gas taking to meet the market demands and helps to protect the owner of newly developed acreage against drainage by other outlets in the vicinity of his well. Above all, it has enabled purchasers to "block," or consolidate, their respective production acreage to or around their pipeline transportation. This latter practice has been encouraged by the Corporation Commission because it helps to prevent undeveloped islands of productive acreage and is an important factor in securing orderly development of the Kansas Hugoton Field.

## VIII

The constant, continuing supervision over production and marketing practices in the Kansas Hugoton Field by the Corporation Commission has as its goal the complete fulfillment of the purpose and intent of the laws enacted with respect thereto by the legislature of the State of Kansas. The Corporation Commission takes the position

that the free interchange of leases and production rights among the purchasers in the Hugoton Field is essential to the discharge of the statutory duty imposed upon it to secure the orderly development of the natural gas resources within the State of Kansas.

## IX

It is further the position of the Corporation Commission that the practice of exchanging leases among purchasers within the State of Kansas is an activity related to  
207 production and gathering of natural gas over which the Corporation Commission has and exercises jurisdiction, and which is specifically excluded from the jurisdiction of the Federal Power Commission by 52 Stat. 821, 15 U. S. C. A. 517(b).

Also it is the position of the Corporation Commission that the transactions involved in this proceeding are designed to make gas produced in Kansas available to Kansas consumers now being served but whose future supply will be seriously threatened if the transactions are enjoined. The regulation and supervision of gas public utilities are designed to secure efficient and sufficient gas service at fair and reasonable rates. If the supply available to users connected to the Kansas Power and Light Company is threatened, it is the duty of the Corporation Commission to lend its efforts in support of a good faith attempt on the part of the Kansas Power and Light Company to secure the gas necessary to enable it to continue the service it is required by statute to render.

## XI

The Corporation Commission was given no notice of the proceedings entitled *Federal Power Commission vs. Panhandle Eastern Pipe Line Company*, No. 1172. Civil, wherein it is sought to enjoin Panhandle Eastern from  
208 culminating a series of transactions arising out of the formation of the Hugoton Production Company, was not represented in that proceeding, and has not otherwise had an opportunity to make its position on and interest in the matter pending known to the Court.

WHEREFORE, the State Corporation Commission of the State of Kansas respectfully prays that this Honorable Court grant it leave to intervene in and be made a party to this appeal, to be heard on the matters herein involved

and to make known and protect its interests as they may appear herein.

JEFF A. ROBERTSON,  
JAY KYLE,  
DOUGLAS GLEASON,

*Attorneys for the State Corporation  
Commission of the State of Kansas.*

209. In United States Court of Appeals  
For the Third Circuit  
(Title Omitted)

*Order Granting the State Corporation Commission of the  
State of Kansas Leave to Intervene—  
Filed Dec. 21, 1948.*

Present: MARIS, GOODRICH and KALODNER, *Circuit Judges.*  
Upon consideration of the petition of The State Corpora-  
tion Commission of the State of Kansas for permission to  
intervene in the above entitled cause,

It is ORDERED that The State Corporation Commission of  
the State of Kansas be, and it is hereby granted leave to  
intervene.

By the Court,  
MARIS,  
*Circuit Judge.*

December 21, 1948.  
IDA O. CRESKOFF, *Clerk.*

(File Endorsement Omitted)

210. In United States Court of Appeals  
For the Third Circuit  
No. 9847

FEDERAL POWER COMMISSION, APPELLANT

v.

PANHANDLE EASTERN PIPE LINE COMPANY.

Appeal from Order of the United States District Court  
for the District of Delaware

Argued December 21, 1948

Before MARIS, GOODRICH and KALODNER, *Circuit Judges.*

*Opinion of the Court—Filed January 6, 1949*

By GOODRICH, *Circuit Judge.*

*Dramatis Personae*

1. Federal Power Commission, called "Commission,"  
plaintiff in the court below and appellant here.

2. Panhandle Eastern Pipe Line Company, called "Panhandle," defendant below and appellee here.

3. State Corporation Commission of the State of Kansas.

4. Various Interveners, shareholders of Panhandle.

5. A part with no speaking lines but referred to by all the parties: Hugoton Production Company, called  
211 "Hugoton." It is a child of Panhandle, incorporated under the laws of the State of Delaware. Whether the child is legitimate or not is one of the points in this litigation.

### *Argument*

Panhandle is an interstate pipe line company which transports and sells gas to local distributors from Texas to Michigan. This gas it gets from wells in Texas, Kansas and Oklahoma. It says it has gas properties under lease which will yield some six trillion cubic feet of natural gas. In September, 1948, Panhandle organized Hugoton, transferred to it gas leases on 97,000 acres of land in Kansas, and retained an option to purchase all or part of the gas produced from that land after January 1, 1963. Hugoton, in turn, has made a contract to sell the gas produced to a distributing company in Kansas which in turn has contracted to sell it for consumption wholly within the state of Kansas. Panhandle also paid Hugoton \$675,000 in cash and took back from this company all of its outstanding capital stock. Then it declared a dividend to its own shareholders, one share of Hugoton to every two-share ownership of Panhandle. Share certificates were made out, put in envelopes and made ready to mail from the office of the United States Corporation Company in New Jersey. Mailing was held up by a temporary restraining order by the District Court. That court, after hearing, refused a preliminary injunction. Plaintiff appealed. We continued the stay until the case could be heard and decided in this Court.

The Commission took its first action on October 26, 1948, when it issued an order instituting an investigation of the formation and proposed operation of Hugoton, and the transfer to it of the gas leases mentioned above. On November 16, 1948, the Commission issued a supplementary order to Panhandle and Hugoton, setting the matter down for hearing on January 24, 1949, directing the com-  
212 panies to show cause why the transfers of leases and stock should not be set aside; and directing maintenance of the status quo pending such determination.



### Legal Points

The controversy here arises out of the statute known as the Natural Gas Act passed in 1938.<sup>1</sup> That statute by its first section declares that federal regulation in the matters of transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. There is no doubt that Panhandle is transporting and selling natural gas in interstate commerce and that under section 1 of the Act such transportation and sale by the company are subject to its provisions. The last sentence of the first section of the statute, however, carves out from the subject-matter to be regulated a very important exception. The words are: " \* \* \* but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U. S. C. A. § 717(b).

It would certainly seem from the first half dozen readings of these exclusionary words in the statute that Congress has pretty clearly taken out from its operation and left to state regulation<sup>2</sup> the subject-matter of the Panhandle-Hugoton transaction. That subject-matter was a parcel of gas leases on land in Kansas. It is pretty hard to see why such leases are not facilities used in the production of natural gas. The word "facilities" has a pretty wide meaning as one looks it up in the

<sup>1</sup> 15 U. S. C. A. § 717.

<sup>2</sup> "In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority.' [H. R. Rep. No. 709, 75th Cong., 1st Sess., 2.] Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. \* \* \* Interstate Natural Gas Co., Inc. v. Federal Power Commission, 331 U. S. 682, 690 (1946). Cf. Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581, 602 (1945) as to the inclusion of production facilities in the rate base.

The states are exercising their regulatory powers in this field. See, e.g., Kansas Gen. Stat., c. 55, §§ 701-713 (Supp. 1947); Mich. Stat. Ann., c. 97 (Supp. 1947); Okla. Stat. Ann., Tit. 52, c. 3, §§ 81-247; Texas Rev. Civ. Stat. Title 102, § 6008 et seq. (Vernon, 1925, with Supp. 1948).

dictionary and a glance at the use of the term in court decisions indicates no narrowing of the breadth of the term.<sup>3</sup> We have no reason to think that Congress meant it to be narrowly applied here.

One is, therefore immediately confronted with the question: Why, if matters concerning local gas leases are excluded from the scope of the statute, does the Commission charged with its administration having anything to do with the transaction between Panhandle and Hugoton? It is true that under section 14 of the Act the Commission has wide investigatory powers, much wider than any subject-matter regulated by the statute. It is, for instance, authorized to conduct investigations to obtain information to serve as a basis for recommendation for further legislation to Congress. It was as a matter of investigation that the Commission first started to work upon this Panhandle transfer. But no one in the argument before this Court challenges the scope of the Commission's investigatory power. And such power does not, as to this litigation, require any action from a court of equity.

The first answer the Commission makes to the contention that regulation of this transaction is beyond the authority which the Congress granted it, is to say that it is now an established principle of administrative law that the administrative body or agency is, in the first instance, its own judge of the scope of its jurisdiction. Several Supreme Court decisions are cited to us in support of this suggested principle.<sup>4</sup> This Court is not unfamiliar with the decisions cited nor the problems they present, and it quite realizes the risks of making sweeping generalizations in a developing field of the law. We think the one suggested to us is too sweeping. The instances cited were cases where courts came in between the litigant and the agency and blocked, or refused to assist, the carrying out of duties imposed by the lawmaking body upon the agency. The Wages and Hours Administration cannot,

<sup>3</sup> See especially *Hartford Electric Light Co. v. Federal Power Commission*, 131 F. 2d 953 (C. C. A. 2, 1942); *Jersey Central Power & Light Co. v. Federal Power Commission*, 129 F. 2d 183 (C. C. A. 3, 1942); *People's Natural Gas Co. v. Federal Power Commission*, 127 F. 2d 155 (App. D. C., 1942).

<sup>4</sup> *Macanley v. Waterman Steamship Corp.*, 327 U. S. 540 (1946); *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). See Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Ill. L. Rev. 368, 409 (1947); cf. *Berger, Exhaustion of Administrative Remedies*, 48 Yale L. J. 981, 992 (1939).

of course, determine whether a given operation in a particular factory is subject to the statute until he finds out what the operation is and then find out if the provisions of the law are being obeyed by the factory owner.<sup>5</sup> But in this case no court is stopping between the Commission and the performance of its job. The Commission is, on the other hand, seeking court help, which it admits is discretionary, in a situation where its investigatory powers have been unopposed.<sup>6</sup> When a party plaintiff seeks court help, it must show that it is entitled to such help. In determining whether a plaintiff is entitled to the relief asked, the court cannot escape the responsibility of deciding whether plaintiff has been given rights or powers for which court sanction is now sought.

On the question of an administrative agency's determination of its own jurisdiction, moreover, we find that with regard to this Commission and this subject-matter, the agency has pretty well defined its own position. It has been found as a fact that "It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases." Furthermore, the Commission itself has stated officially: "The Federal Power Commission is of the opinion that it was the intent of Congress that the control of production or gathering of natural gas should remain a function of the States and that the Natural Gas Act should not provide for regulation of those subjects." 18 Code Fed. Regs. § 03.79, p. 2903 (Supp. 1947). And the same point has been stated in Supreme Court opinions, although the statements are doubtless *obiter* and the court's attention was directed to some other point.<sup>7</sup>

Our conclusion as to the argument on this part of the case is that it is our obligation to go ahead and decide the instant appeal on what we believe to be its merits without waiting for further action by the Commission.

<sup>5</sup> Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186 (1946).

<sup>6</sup> See 2 Vom Baur, Federal Administrative Law § 825 (1942).

<sup>7</sup> "We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over the production or gathering of natural gas." Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 594, 612-613 (1944). See also Interstate Natural Gas Co., 331 U. S. 682, 690 (1946); Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581, 602 (1945).

The Commission's argument for foundation of jurisdiction makes three points. In the first place it says that Panhandle in a previous matter in which the Commission undoubtedly had jurisdiction, represented most of the leases included in the Panhandle-Hugoton transaction to be used and useful in the operation of its then existing pipe line facilities. (2) On the basis of this and, of course, other representations and facts, the Commission permitted such leases to be included in Panhandle's rate base. (3) Panhandle in an application for certificates of public convenience and necessity under section 7 of the Act made representations to the Commission on the basis of acreage of gas leases it held, some of which are being disposed of in this transaction with Hugoton. These three points, it is said, bring the alienation of gas leases within the scope of Commission activity and form the basis for asking that the Hugoton transaction be held up until the Commission makes its decision. The Commission has been very competently

216 represented and the argument made on its behalf is ingenious and plausible. That there is a connection between the handling of matters in a local gas field and interstate transportation and sale of gas cannot be denied. No doubt Congress could have gone much further than it did in fixing the scope of federal regulation. But it clearly and intentionally drew a line short of where it could have gone.

So, it seems to us that the Commission's argument proves too much. If it prevails, a gas company which had had Commission action on its rate base could never sell an outworn truck, nor an obsolete drilling machine without getting Commission approval. It would, likewise, be compelled to take to the Commission every proposed transfer of a ten acre gas lease in exchange for another, no matter how obviously desirable the transfer might be in collecting its holdings in a contiguous area instead of having them scattered. In other words, by this process, it seems to us, the Commission will have taken over the area of regulation of facilities for gas production which by express terms of section 1 of the statute were to be excluded from Commission regulation. The words of the Court of Appeals for the District of Columbia seem applicable, although they were said in connection with a different kind of claim by the Commission: "But the administrative body finds a sufficient penumbra of meaning to justify a claim to more authority than appears upon the face of its grant. It asserts the extended authority and thus forces the issue upon the



courts." The court went on to point out that if it is desirable to extend Commission power, Congress should be asked to do it. The same advice applies here *mutatis mutandis*.

Section 20 of the statute provides for action being brought in federal courts "whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute violation of the provisions of this Act or any rule or regulation thereunder." 15 U. S. C. A. § 717. Now

the Commission has not alleged that Panhandle or Hugoton has violated the statute. The most it says is that the Commission might, on investigation, find that what had been done was in violation of the law. So the first part of the language quoted is not applicable to give it a standing to ask for court help at this point.

The appellant's argument points further to the Commission's order of November 10, in which it directed the company to show cause why the transfer of leases should not be set aside and directed maintenance of the status quo pending determination. This is an order no doubt. But if it is not a valid order because beyond Commission jurisdiction, the Commission cannot have court help to enforce it. We have endeavored to set out above why we think an order interfering with the transfer of these leases would go beyond Commission authority.

Argument for some of the interveners tells the Court that the Panhandle-Hugoton transaction is a thing done and there is nothing a court can do to stop it. This argument makes no appeal to us. We do not think that the shareholders of Panhandle have fully completed rights to their stock dividends of Hugoton until they get the certificates. Those certificates are now in the hands of the custodian and are held there by the action of this Court. If we were convinced that the Commission had the proper grounds for asking for relief, we think an injunction would accomplish everything necessary to prevent consummation of the transaction. It is not because we think the equitable powers of the District Court are insufficient, but because we do not think the facts call for their exercise, that we are approving that court's refusal of relief in this case.

The judgment of the District Court will be affirmed. Because of the nature of the situation, however, we shall continue the stay order for ten days from the date of the

\* Border Pipe Line Company v. Federal Power Commission, 20 F. 2d (App. D. C. Nov. 22, 1948).

entry of our judgment. That will give the plaintiff opportunity to seek certiorari if it is so advised. Unless we do take this action it is quite obvious that since our stay order disappears when the judgment is entered the case will become moot.

219 In United States Court of Appeals  
For the Third Circuit  
No. 9847

FEDERAL POWER COMMISSION, APPELLANT

v.

PANHANDLE EASTERN PIPE LINE COMPANY

On Appeal from the United States District Court  
for the District of Delaware

Present: Maris, Goodrich and Kalodner, Circuit Judges.  
*Judgment--Filed Jan. 6, 1949.*

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.  
January 6, 1949.

BY THE COURT,  
HERBERT F. GOODRICH,  
Circuit Judge.

(File endorsement omitted.)

223 In United States Court of Appeals  
For the Third Circuit  
(Title Omitted)

Present: Maris, Goodrich and Kalodner, Circuit Judges.  
*Order Granting Further Interlocutory Stay Until  
January 16, 1949--Filed Jan. 6, 1949*

IT IS ORDERED that Panhandle Eastern Pipe Line Company, its officers, agents, representatives and employees, be and they hereby are (1) enjoined and restrained from paying to its common stockholders as a dividend the 810,000 shares of the capital stock of Hugoton Production Company referred to in said petition for stay, from delivering to such stockholders certificates for such 810,000 shares,

and from transferring the title to such shares of stock to such stockholders or to any other person; and (2) required to cause Hugoton Production Company, its officers, representatives, employees and agents, including its transfer agents, to refrain from transferring, assigning, or conveying the certain oil and gas leases and gas leases on 96,164.21 acres of land in Grant and Stevens Counties, Kansas, referred to in said petition, or any of such leases, to any person, and from issuing or transferring any of its capital stock to any person, until ten days from the date of this order.

January 6, 1949.

BY THE COURT,  
HERBERT F. GOODRICH,  
Circuit Judge.

(File endorsement omitted.)

228

In United States Court of Appeals  
For the Third Circuit

(Title Omitted)

*Stipulation Continuing Restraining Order of Jan. 6, 1949,  
and Staying Mandate to Jan. 23, 1949—  
Filed Jan. 14, 1949*

It is hereby stipulated and agreed by and between counsel for the Federal Power Commission and Panhandle Eastern Pipe Line Company, appellant and appellee, respectively, in the above-entitled case, that the restraints and requirements imposed upon appellee by this Court's restraining order entered on January 6, 1949, shall continue in full force and effect to and including January 23, 1949; and,

It is further stipulated and agreed that the mandate of the Court upon its judgment entered herein on January 6, 1949, shall be stayed to and including January 23, 1949.

January 14, 1949.

/s/ WILLIAM S. TARVER,  
William S. Tarver,  
Counsel for Federal Power  
Commission, Appellant.

/s/ E. ENNALLS BARL,  
E. Ennalls Barl,  
Counsel for Panhandle  
Eastern Pipe Line Company,  
Appellee.

It is so ordered.

BY THE COURT,

HERBERT F. GOODRICH,  
Circuit Judge.

(File endorsement omitted.)

229

In United States Court of Appeals  
For the Third Circuit  
(Title Omitted)

*Order Staying Mandate and Continuing Interlocutory  
Restraint to Feb. 12, 1949, etc.*

Upon consideration of plaintiff-appellant's motion to stay the mandate and to continue in effect the interlocutory restraint imposed upon defendant-appellee by our order of January 6, 1949, as further extended to January 23, 1949, by a stipulation between counsel for the parties signed January 14, 1949, and

The Court having been advised by plaintiff-appellant that the Solicitor-General has authorized the filing of a petition for a writ of certiorari with the Supreme Court of the United States, and such petition will be filed, it is this 21st day of January, 1949,

ORDERED that our mandate be and hereby is stayed and the interlocutory restraint imposed by our order of January 6, 1949, as further extended by a stipulation between counsel for the parties, be continued in force and effect until February 12, 1949, and, upon notification to the clerk of this Court on or before said date that plaintiff-appellant has filed in the Supreme Court its petition for a writ of certiorari, until final disposition of the cause by the Supreme Court.

Upon stipulation by consent for plaintiff-appellant and defendant-appellee, Panhandle Eastern Pipe Company, the restraints and requirements herein imposed are conditioned upon the entry on or before January 28, 1949, of an order by the Federal Power Commission postponing its hearing now set for February 7, 1949, in its Docket No. G-1147 until some date to be hereafter fixed by the Commission which will be subsequent to final disposition of this case by the Supreme Court.

January 21, 1949.

BY THE COURT,

GOODRICH,  
Circuit Judge.



230 In the Supreme Court of the United States

*Stipulation as to Printing Record—Filed February  
11, 1949*

SUBJECT TO THIS COURT'S APPROVAL, IT IS HEREBY STIPULATED AND AGREED by and between the parties to this cause, through their respective attorneys, that for the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case, the printed record may consist of the following:

1. The following portions of the typewritten appendix to the brief for appellant, Federal Power Commission, as filed with the United States Court of Appeals for the Third Circuit: page 1a, about the middle of the page, commencing with the words, "In the District Court of the United States," to and including page 52a, about the middle of the page, concluding with the words, "Bernice P. Stone, Notary Public in and for the District of Columbia."

2. The following excerpts from the transcript of hearing in the District Court of the United States for the District of Delaware, on motion to dissolve restraining order and motion for preliminary injunction:

231 (a) Page 1, about the middle of the page, commencing with the words, "Superior Courtroom No. 1," to and including page 2, line 5, concluding with the words, "Girard Smith, a Hugoton stockholder."

(b) Page 3, line 13, the words and punctuation, "Mr. Patterson:"

(c) Page 5, line 2, commencing with the words, "Now, those transactions," to and including page 7, line 9, concluding with the words, "the stockholders."

(d) Page 7, line 15, commencing with the words, "The Court," to and including page 8, line 13, concluding with the words, "they wanted."

(e) Page 20, line 33, commencing with the words, "Mr. Patterson," to and including page 21, line 9, concluding with the words, "All right."

(f) Page 21, line 11, commencing with the words and punctuation "Mr. Farbach:" to page 22, line 14, concluding with the word "lifted".

(g) Page 22, line 15, commencing with the words, "The Court," to page 24, line 21, concluding with the word, "stock."

(h) Page 25, line 6, commencing with the words and punctuation "Mr. McInerney:" to and including page 26, line 15, concluding with the word "picture".

(i) Page 29, line 7, commencing with the words and punctuation "Mr. Munson:" to line 18, concluding with the word "name".

(j) Page 29, line 20, commencing with the words, "Mr. Tarver," to page 30, line 2, concluding with the words and punctuation, "Mr. Tarver:".

(k) Page 30, line 6, commencing with the words, "we now ask leave," to line 8, concluding with the words "equity powers."

(l) Page 39, line 5, commencing with the words and punctuation "The Court:", to and including page 41, line 6, concluding with the words "public convenience and necessity".

(m) Page 45, line 1, commencing with the words, "The Court," to line 7, concluding with the words and punctuation, "of the act,".

(n) Page 46, line 22, the words and punctuation, "Mr. Tarver:".

(o) Page 48, line 15, commencing with the words, "May it please," to line 16, concluding with the word, "Commission."

(p) Page 51, line 6, commencing with the word "If" to page 52, line 2, concluding with the word and punctuation "please—".

(q) Page 52, line 3, commencing with the words, "The Court," to line 7, concluding with the words, "the court, yes."

(r) Page 56, line 15, commencing with the words, "Mr. Tarver," to and including page 57, line 11, concluding with the words, "ultimate decision."

(s) Page 66, line 7, the words and punctuation, "Mr. Tarver:".

(t) Page 68, line 2, commencing with the words, "Judge Patterson," to and including line 13, concluding with the words, "this way."

3. The following portions of the typewritten appendix to the brief for appellant, Federal Power Commission, as filed with the United States Court of Appeals for the Third Circuit: pages 57a to 88a, inclusive.

4. The following portions of the proceedings in the United States Court of Appeals for the Third Circuit:

(a) Order dated November 30, 1948, fixing time for hearing of cause on appeal and granting stay pending appeal.

(b) Petition of The State Corporation Commission of the State of Kansas for permission to intervene; filed on December 20, 1948.

(c) Order dated December 21, 1948, granting leave to said Commission to intervene.

(d) Opinion of the Court, filed January 6, 1949.

(e) Judgment, filed on January 6, 1949.

(f) Order filed on January 6, 1949, continuing stay order in effect for a period of 10 days.

(g) Stipulation and order dated and filed on January 14, 1949, continuing restraining order and staying mandate to January 23, 1949.

(h) Order dated January 21, 1949, staying mandate and continuing interlocutory restraint in force and effect.

IT IS FURTHER STIPULATED AND AGREED THAT the printing of the foregoing material is without prejudice to the right of the parties to refer to and rely upon any portion of the transcript of record which is not included in the portions of the record to be printed as above described.

Dated: this 10th day of February, 1949.

PHILIP B. PERLMAN,  
*Solicitor General of the  
United States,  
Attorney for Petitioner*

E. ENNALLS BERL,  
*Attorney for Respondent,  
Panhandle Eastern Pipe  
Line Company.*

ARTHUR G. CONNOLLY,  
*Attorney for Respondent-  
Intervener Gregory B. Smith.*

C. S. LAYTON,  
*Attorney for Respondent-  
Intervenor Stephen Carlton  
Clark, et al.*

JEFF A. ROBERTSON,  
*Attorney for Respondent-  
Intervener the State  
Corporation Commission of  
The State of Kansas.*

## Supreme Court of the United States

No. 558—October Term, 1948

*Order allowing certiorari*

Filed March 28, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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CLERK

No. 558

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In the Supreme Court of the United States

OCTOBER TERM, 1948

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FEDERAL POWER COMMISSION, PETITIONER

PANHANDLE EASTERN PIPE LINE COMPANY, ET AL.

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT



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# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 558

FEDERAL POWER COMMISSION, PETITIONER

v.

PANHANDLE EASTERN PIPE LINE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on January 6, 1949.

## OPINIONS BELOW

The findings of fact, conclusions of law and opinion of the United States District Court for the District of Delaware appear in the Record at pages 49-50, 60-66. The opinion of the United States Court of Appeals for the Third Circuit (R. 74-81) is not yet officially reported.



## JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1949 (R. 81). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

## STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821, as amended by 36 Stat. 83, 15 U. S. C. 717 *et seq.*) are set forth in the Appendix, *infra*, pp. 26-34.

## QUESTIONS PRESENTED

The Federal Power Commission instituted an investigation, pursuant to Section 14 of the Natural Gas Act, to inquire into the circumstances surrounding the proposed disposition of gas reserves owned by respondent Panhandle, a natural gas company subject to the Commission's jurisdiction under the Act. The investigation was for the purpose of determining whether the Commission had jurisdiction with respect to the proposed disposition and, if so, whether any Commission action was required. The Commission ordered that the *status quo* be maintained pending the outcome of its investigation, but Panhandle refused to comply with this order. Upon the Commission's application to a District Court for an injunction to maintain the *status quo* pending the outcome of its investigation, the court withheld such aid from the Commission on the basis of its independent determination that the Commission had no jurisdiction in the premises; the court did not limit itself, as the Commis-

sion urged, merely to an inquiry whether there is a reasonable basis in the Natural Gas Act to support such jurisdiction, thus permitting the Commission in the first instance to investigate all the facts in order to ascertain whether the proposed disposition had any aspects which might bring it within the Commission's jurisdiction.

The principal question presented is whether the courts below were correct in withholding the interlocutory relief sought by the Commission. A further question which may be reached, on the assumption that it was necessary for the court to satisfy itself at the present stage of the proceedings that the Commission had jurisdiction, is whether the Commission does have jurisdiction with respect to a natural gas company's disposition of its reserves.<sup>1</sup>

---

<sup>1</sup> The court below went beyond the question of whether there is a reasonable basis for Commission jurisdiction and held that the Commission does not have jurisdiction in any circumstances over a natural gas company's disposition of its gas reserves. The Commission believes that the court below improperly reached that question, for the investigation pending before the Commission in aid of which the Commission is here seeking judicial assistance was instituted for the purpose, among others, of inquiring into and passing on that question. Accordingly, the Commission is very reluctant to prejudge the result of its investigation and to take a position on this question in this Court. However, in order to avoid precluding itself from presenting argument on that question if this Court should determine that that question is here reached, the Commission is prepared to urge that at least the disposition of some gas reserves by natural gas companies is subject to its jurisdiction under the Natural Gas Act. Whether Panhandle's disposition of the reserves here involved is subject to this jurisdiction depends on the facts and evidence developed in the course of the investigation pending before the Commission.

## STATEMENT

Respondent, Panhandle Eastern Pipe Line Company (Panhandle), is a "natural-gas company" subject to the Federal Power Commission's jurisdiction under the National Gas Act. It owns and operates an integrated natural gas pipeline system originating in the Hugoton and Panhandle natural gas fields of Kansas, Oklahoma and Texas and extending across the states of Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio and into the State of Michigan (R. 3-4). It supplies natural gas to distributing companies along the route of its pipelines serving more than 1,500,000 customers. These distributing companies have supply contracts with Panhandle which are filed with the Commission as rate schedules (R. 4).

Prior to October, 1948, Panhandle owned, as part of its pipeline system, substantial gas reserves, including approximately 96,000 acres of gas leases which were located in the Kansas portion of the Hugoton gas field and contained an estimated 700 billion cubic feet of gas (R. 4). In 1942, most of these 96,000 acres of reserves, although not used, were, on the basis of Panhandle's representations that they were "used and useful property," included by the Commission in fixing Panhandle's rate base, and delay/rentals, renewal bonus payments and all other exploration and development costs relating to these leases were similarly allowed as revenue deductions. (*City of Detroit v. Panhandle Eastern Pipe Line Co., In the Matter of*

*Panhandle Eastern Pipe Line Co.*, F. P. C. Dockets, G-200, G-207; 3 F. P. C. 273, affirmed 143 F. 2d 488 (C. A. 8), 324 U. S. 635). To date, more than \$665,000 has been so deducted (R. 7, 12). In addition, in applications filed in 1946 and thereafter, pursuant to Section 7 of the Act, as amended (Appendix, *infra*, pp. 27-30), for certificates of public convenience and necessity to construct and operate its so-called "Group A and B facilities," and "Group C" facilities (F. P. C. Dockets G-706, G-876, respectively),<sup>2</sup> Panhandle included most of these 96,000 acres (all but 25,000 acres in G-706; all but 1,640 acres in G-876) among the gas reserves held or controlled by it, and represented that these reserves were adequate to justify the issuance of the certificates<sup>3</sup> (R. 12-14). On the basis of these representations, the Commission, finding *inter alia* that Panhandle's gas supply was adequate to meet the requirements of the service to be rendered by means of the proposed facilities, issued the requested certificates (R. 13-14). 5 F. P. C. 544, 546; 949, 952 (F. P. C. Docket G-706, orders of June 4, 1946, and

<sup>2</sup> These facilities, the cost of which was estimated at about \$57,000,000, were designed to augment service to existing customers on Panhandle's system (R. 7).

<sup>3</sup> Section 57.5 of the Commission's Order No. 99, amending its Provisional Rules of Practice and Regulation under the National Gas Act (7 Fed. Reg. 6844) provides:

Applications for certificates of public convenience and necessity \* \* \* shall set forth \* \* \* the following \* \* \*

(f) A statement of the gas reserves which are to supply the market which is proposed to be served \* \* \*



of November 30, 1946); F. P. C. Docket G-876, Order of June 10, 1948.

On September 22, 1948, Panhandle caused the creation of Hugoton Production Company (Hugoton), a Delaware corporation (R. 4, 61), the officers, directors and offices (other than the statutory office in Delaware) of which are the same as those of Panhandle (R. 5). On October 11, 1948, pursuant to the agreement of the same day, Panhandle transferred to Hugoton its right, title and interest in the 96,000 acres of gas reserves in return for all of Hugoton's 810,000 shares of stock (R. 4-5, 61).<sup>4</sup> Hugoton agreed promptly to proceed to develop this acreage and to attempt to negotiate sales of the gas to purchasers other than Panhandle (R. 4).<sup>5</sup> Panhandle, however, retained an option to purchase on and after January 1, 1965, at the going market price, all or any specified portion of the gas produced from these reserves, which, the agreement contemplated, would still contain 400 billion of the 700 billion cubic feet of gas now estimated to be there contained (R. 4-5, 27, 61).

On the same day, Panhandle's Board of Directors declared a dividend of  $\frac{1}{2}$  share of Hugoton

<sup>4</sup>Panhandle also paid Hugoton \$675,000 in cash and transferred some small additional oil acreage not here relevant (R. 4, 5, 61).

<sup>5</sup>Hugoton, on October 18, 1948, contracted to sell gas from these reserves to the Kansas Power and Light Company. The contract provided that all volumes of natural gas covered thereby are to be produced from wells located in the State of Kansas and Kansas Power and Light Company agrees that said gas is to be consumed by it or sold by it for consumption wholly within said State of Kansas (R. 27, 61).

stock for each share of its outstanding 1,620,000 shares of common stock payable on November 17, 1948, to stockholders of record at the close of business on October 29, 1948 (R. 5, 29-30, 62-63). Panhandle's stockholders were advised of this action by letter dated October 11 (R. 25, 31-32); following which the Hugoton stock was traded "over-the-counter" on a "when, as and if basis" (R. 26, 63). On October 29, Panhandle delivered to Hugoton's transfer agent, stock certificate No. 1 for 810,000 shares of Hugoton common stock registered in Panhandle's name and assigned in blank for transfer to Panhandle's stockholders of record on that day, (R. 25-26, 63). By November 13, the date on which the Commission filed its complaint in the District Court and secured an *ex parte* restraining order (see *infra*, p. 8), the transfer agent had prepared stock and scrip certificates registered in the names of Panhandle's stockholders entitled thereto, and inserted these certificates in envelopes to be mailed on November 15 and 16 (R. 26).

Meanwhile, by order dated October 26, 1948, the Commission instituted an investigation, pursuant to Section 14 of the Act, Appendix, *infra*, pp. 30-31, "of the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said company by Panhandle \* \* \*" (R. 11, 63). By supplementary order dated November 10, 1948, the Commission, in addition to fixing a date for hearing

on its investigation, ordered Panhandle and Hugoton to show cause why they should not be directed to cancel the contract of October 11, and to refrain from again transferring these gas reserves without the Commission's consent and from paying the Hugoton stock as a dividend, or otherwise transferring it (R. 6, 11-18). The Commission also ordered that the *status quo* be maintained pending final determination (R. 6, 17). Panhandle was advised of the order by telegram and directed to notify the Commission by November 12 that it would comply with the restraint ordered (R. 7). Panhandle failed and refused to do so (R. 7).

On November 13, the Commission filed a complaint in the United States District Court for the District of Delaware seeking an injunction against Panhandle to restrain it from proceeding further in the stock distribution, and to maintain the *status quo* pending final determination by the Commission of the questions presented at the hearing before it (R. 1-18). An *ex parte* restraining order was granted (R. 21-23). The District Court thereafter, however, refused to grant a preliminary injunction on the ground that the Commission's complaint and the affidavits filed by it and by Panhandle (R. 20-21, 24-37) "do not show any basis for the relief sought by [the Commission]" (R. 49, 66).<sup>6</sup> On appeal, the court below affirmed (R. 74-81).<sup>7</sup>

<sup>6</sup> The district court permitted the intervention as defendants of several of Panhandle's stockholders (R. 64-65).

<sup>7</sup> The State Corporation Commission of the State of Kansas was permitted to intervene in the court below (R. 74).

## SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a federal court shall, in the first instance, independently determine the scope of the jurisdiction of a federal administrative agency when the latter seeks injunctive assistance to maintain the *status quo* pending the outcome of an investigation instituted by such agency.

2. In holding that the facts of this case do not call for the exercise of the court's equitable powers to maintain the *status quo* pending the outcome of the Commission's inquiry.

3. In failing to hold that there is a reasonable basis in the Natural Gas Act for Commission jurisdiction over a natural gas company's disposition of its gas reserves.

4. In holding that under the Natural Gas Act the Commission has no jurisdiction in any circumstances over a natural gas company's disposition of its gas reserves.

5. In affirming the judgment of the District Court.

## REASONS FOR GRANTING THE WRIT

In this case, the Federal Power Commission, upon instituting its investigation into whether Panhandle's proposed disposition of a portion of its gas reserves to Hugoton violated the Natural Gas Act or Commission orders issued thereunder or required Commission action of some sort, sought judicial aid in maintaining the *status quo* pending



the outcome of its investigation. The refusal of the court below so to aid the Commission, was based, not on a lack of power (R. 80)<sup>8</sup> or on countervailing equitable considerations (R. 80),<sup>9</sup> but on the ground that the Commission had failed to present adequate reasons for obtaining such assistance (R. 78, 80). The Court held that the Commission, as any other litigant, had to show that it had "been given rights or powers for which Court sanction is now sought" (R. 78); that since the Commission, not the private litigant, was seeking judicial aid, the established principle that the administrative agency is, in the first instance, its own judge of the scope of its statutory jurisdiction, was inapplicable (R. 77-78); and, further, that in any case the Commission is without jurisdiction over the proposed transfer (R. 79-80).

In so holding, the court below has determined substantial and important questions of federal law, which affect the functioning of the Federal Power Commission and other federal administrative

<sup>8</sup> The question as to the power of a federal court so to assist an administrative agency was raised in *SEC v. Long Island Lighting Co.*, No. 1059, Oct. Term, 1944, and in *West India Fruit & Steamship Co. v. Seatrain Lines*, No. 482, this Term. In the *Long Island* case, certiorari was granted (324 U. S. 837), but upon the cause's becoming moot, this Court ordered the judgment vacated and the complaint dismissed, 325 U. S. 833. The petition for writ of certiorari in the *West India* case (170 F. 2d 775, (C. A. 2)) was dismissed on petitioner's motion. Journal of this Court, Oct. Term, 1948, p. 141 (February 7, 1949).

<sup>9</sup> The court below expressly rejected the contention of Panhandle's stockholders, who had intervened, that the transaction was a thing done, and that there was nothing a court could do to stop it (R. 80).

bodies. The court's refusal to permit the Commission in the first instance to determine its statutory jurisdiction, and to maintain the *status quo* pending such determination, involves the basic relationship between the federal courts and federal administrative agencies and is in conflict with the ruling of the Court of Appeals for the Second Circuit in *West India Fruit & Steamship Co. v. Seatrain Lines*, 170 F. 2d 775 (C. A. 2): Moreover, by improperly prejudging the Commission's jurisdiction and holding that the Natural Gas Act does not vest in the Commission any jurisdiction over a natural gas company's disposition of its gas reserves, regardless of the facts or the effects of such disposition, the court below opens the way to further circumvention and frustration of the Commission's regulatory jurisdiction and to rate increases aggregating several millions of dollars per year. For these compelling reasons, we submit review of this decision below is warranted.

1. The court below correctly proceeded from the premise that a federal court had power to assist an administrative agency to function effectively by maintaining the *status quo* pending the outcome of the agency's investigation into possible statutory violations (R. 80). The granting of interlocutory relief by a court to preserve the *status quo* pending the determination of a controversy before it or another tribunal has been a traditional form of equitable relief. *United States v. United Mine*

*Workers*, 330 U. S. 258; *Babbitt v. Dutcher*, 216 U. S. 102; *Continental Illinois N. B. & T. Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 675-676; *Graselli Chemical Co. v. Actua Explosives Co.*, 252 Fed. 456 (C.A. 2); *Northern Pacific Ry. v. Soderberg*, 86 Fed. 49 (C.C.D. Wash.). With the creation of administrative agencies charged with the protection of public interests and standing to protect these interests in court, the courts similarly may assist administrative agencies. *Securities & Exchange Commission v. U. S. Realty & Improvement Co.*, 310 U.S. 434; *West India Fruit & Steamship Co. v. Seatrain Lines*, *supra*, fn. 8, p. 10; *Isbrandtsen Steamship Co. v. United States*, 5 Pike & Fischer, Administrative Law, 81a. 22-37 (S.D.N.Y., December 20, 1948). This follows, since the normal powers of the courts are available in order that these agencies be able to function effectively in carrying out congressional policies. For, as this Court has often admonished, the federal courts are not to treat an administrative agency as an "alien intruder, to be tolerated if must be, but never to be encouraged or aided." *United States v. Morgan*, 307 U.S. 183, 191. In *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, this Court in dealing with a related question, sustained the implied and inherent power of reviewing courts to preserve the *status quo* in order "to save the public interest from injury or destruction" during the pendency of an

appeal. This was stated to be in accord with "the purpose of Congress to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. *United States v. Morgan*, 307 U. S. 183, 190-91; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes." 316 U. S. at 15; see also, *United States v. Ruzicka*, 329 U. S. 287, 295; cf. *Addison v. Holly Hill Co.*, 322 U. S. 607, 620-622.

2. In determining whether the Commission was entitled to the injunctive assistance which it sought, the court below erred in itself undertaking to determine the substantive question for the determination of which the Commission had instituted the investigation, *i. e.*, whether Panhandle's disposition of the reserves was subject to the Commission's jurisdiction and hence whether the transfer violated the Natural Gas Act or Commission orders issued pursuant thereto. The court should, we submit, have limited its inquiry to whether there was a reasonable basis for the Commission's action in instituting the investigation, and should have left it to the Commission to determine in the first instance whether the facts disclosed by its investigation presented any basis for Commission



jurisdiction or action.<sup>10</sup> *West India Fruit & Steamship Co. v. Seatrain Lines*, *supra*, p. 10, fn. 8.

Such limitation on the court's inquiry not only is in harmony with the principle of cooperation between the federal courts and federal administrative agencies, discussed *supra*, but accords with the established principle that the administrative agency is the judge, in the first instance, of the scope of its statutory jurisdiction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540; *Federal Power Commission v. Arkansas Power & Light Co.*, 330 U.S. 802; *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186; *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501. The principle is applicable both where the problem before the administrative agency is factual in nature and where it is a "purely legal problem" as well.<sup>11</sup> In *Federal Power Commission v. Arkansas Power & Light Co.*, *supra*, where the Court of Appeals for the District of Columbia had refused to permit the Commission first to pass on the questions there involved on the ground that they were purely legal (156 F. 2d 821, 828), this Court reversed *per curiam*. See also *Macauley v. Waterman Steamship Corp.*,

<sup>10</sup> If the final order issued by the Commission as a result of its proceeding is adverse to Panhandle, Panhandle of course, could seek judicial review thereof, in accordance with the provisions of Section 19 of the Act, Appendix, *infra*, pp. 31-33.

<sup>11</sup> The problems before the Commission in regard to whether Panhandle's proposed transfer violated the Act or the Commission's orders are both legal and factual, see *infra*, pp. 16-22.

*supra*, at 544; *Myers v. Bethlehem Shipbuilding Corp.*, *supra*, at 51 and cases cited. Moreover, the fact that the Commission, not a private litigant, was invoking judicial assistance, does not warrant departure from this principle, for the underlying reasons—comity between court and administrative agency, and desirability of orderly procedure—appear equally applicable, whether a private litigant invokes judicial process to interfere with an administrative proceeding, or, where, as here, the administrative agency seeks judicial aid to protect its proceeding. And as this Court has held, federal courts grant an administrative agency's request for assistance upon a finding of only "probable cause," where it is the agency, not a private litigant, which is seeking judicial help.<sup>12</sup> *Oklahoma Press Pub. Co. v. Walling*, *supra*; *Endicott-Johnson Corp. v. Perkins*, *supra*.

The failure of the court below to permit the Commission to determine in the first instance the scope of its statutory jurisdiction conflicts with the ruling of the Court of Appeals for the Second Circuit in *West India Fruit & Steamship Co. v. Seatrain Lines*, 170 F. 2d 775. In that case, as here,

<sup>12</sup> To so limit the scope of judicial inquiry in determining whether to grant an injunction to aid the Commission in the protection of the public interest is consistent with the fact that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, 552; *Yakus v. United States*, 321 U. S. 414, 440-441 and cases cited.

an injunction was sought to maintain the *status quo* pending an investigation instituted by the Maritime Commission into whether certain reductions in rates proposed by Seatrain violated the Shipping Act of 1916, as amended. The Second Circuit there affirmed the granting of the injunction, leaving the Commission to "determine whether it had statutory jurisdiction and if so, how it should act." 170 F. 2d at 779. In so doing, the court refused to follow its earlier decision in *Securities & Exchange Commission v. Long Island Lighting Co.*, 148 F. 2d 252, and in addition distinguished it upon the ground that in that case the court "rested its conclusion on a holding that the S. E. C. unmistakably lacked any possible jurisdiction; on the facts now before us, we are unable so to hold as to the Commission here." 170 F. 2d at 779. The court below in the instant case should, we submit, have followed this approach and similarly limited its inquiry into whether there was any reasonable basis for Commission jurisdiction.

3. There is in the Natural Gas Act, we submit, at least a reasonable basis for Commission control over a natural gas company's disposition of its gas reserves. Section 7(b) of the Act (Appendix, *infra*, pp. 27-28), prohibits the abandonment by a natural gas company of "all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval

of the Commission \* \* \* \*<sup>13</sup> Whether the transfer of reserves is excluded from the Commission's control under Section 7(b) depends, on whether these gas reserves are within the "production or gathering of natural gas" exemption of Section 1(b).<sup>14</sup>

The court below, we submit, misconstrued the scope of this exemption by reading the term "facilities" into the exemption and construing that term in accordance with its dictionary definition. That exemption, however, is not so to be rewritten, but rather is to be read as written and in accordance with its purpose, as manifested by the relevant legislative materials. *Colorado Interstate Co. v. F.P.C.*, 324 U.S. 581; *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682; *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591; cf. *Panhandle Eastern Pipe Line Co. v. Public Service Commis-*

<sup>13</sup> Section 7(b) continues on to require that the Commission not permit such abandonment without a finding "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted or that the present or future public convenience or necessity permit such abandonment."

<sup>14</sup> The Commission's disclaimer of control over production and gathering quoted by the court below (R. 78), merely paraphrases the statutory language and was not intended to be broader in scope than the statutory exemption itself. Similarly, the statement below that "It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases" (R. 78), does not present the full picture. Until this time, such trading has taken place with the view of blocking in reserves and improving service (R. 72), and not to achieve the results here sought by Panhandle. See *infra*, pp. 22-24.

sion, 332 U.S. 507. As explicitly recognized in these cases, the exemption has but a limited scope, and as an exception to the primary grant of jurisdiction, is "to be strictly construed." *Interstate* case at 690-691. It was made part of the Act, in accordance with the Act's purpose of complementing state regulation and occupying the field in which this Court had held the states could not act, in order to preserve to the states powers of regulation in areas in which they could act, and not to free companies from effective public control. (*Interstate* case at 690; *Hope* case at 610; H. Rep. No. 709, 75th Cong., 1st sess., p. 2).<sup>15</sup> The Act envisaged a comprehensive and effective scheme of dual regulation, state and federal, to protect the consumers against exploitation at the hands of natural gas companies. "It does not contemplate ineffective regulation at either level." *Public Service Commission* case at 520-521. Thus, the exemption was not intended as a means to defeat effective regulation and does not extend to all aspects of the producing or gathering of gas but

<sup>15</sup> The House Committee on Interstate and Foreign Commerce in its report which the Senate Committee on Interstate Commerce adopted verbatim characterized the exemptions of Section 1(b) as "not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill." H. Rep. No. 709, 75th Cong., 1st sess., p. 3; S. Rep. No. 1162, 75th Cong., 1st sess., p. 3.



only those over which the states have power to act, i.e., regulation of "the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern." *Interstate case* at 690.

Read in light of these standards, Section 1(b) does not necessarily deny the Commission jurisdiction over the transfers here involved. On one hand, the existence of Commission jurisdiction does not conflict with state regulation. The various state statutes referred to by the court (R. 76) below only make provision for conservation of natural gas resources; none of these statutes attempts to control the transfer or disposition of gas leases and reserves. Kansas Gen. Stat., c. 55, §§ 701-713 (Supp. 1947); Mich. Stat. Ann., c. 97 (Supp. 1947); Okla. Stat. Ann., Tit. 52, c. 3, §§ 231-247; Texas Rev. Civ. Stat., Tit. 102, § 6008 *et seq.* (Vernon 1925, with Supp. 1948); see, also, La. Gen. Stat., Secs. 4766-4826.2. Nor does the Kansas State Corporation Commission which has intervened claim such power (R. 70-74). On the other hand, absence of jurisdiction in the Commission over these transfers may defeat effective regulation in the public interest. Not only would the existence of such jurisdiction protect the public interest by controlling natural gas company's disposition of its reserves with the result, as we show, *infra*, p. 24, of obtaining increased rates, but it also assures the public that a company will not, by disposing of its gas

reserves, disable itself from rendering service and thereby, for all practical purposes, abandon service without Commission approval, contrary to the mandate of Section 7(b).<sup>16</sup>

Furthermore, additional bases of jurisdiction may be revealed in the course of the investigation which the Commission has initiated and pending which it has sought judicial aid in maintaining the *status quo*. For example, Panhandle has in three applications for additional certificates of public convenience and necessity seeking authority to construct additional facilities costing about \$57,000,000 under Section 7(c) of the Act, Appendix, *infra*, pp. 28-29, included most of the acreage here involved in support of its claim that it had natural gas reserves adequate to justify the issuance of the certificates sought. F. P. C. Docket Nos. G-706, 876;

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<sup>16</sup> The 96,000 acres here involved are estimated to contain 700 million cubic feet of natural gas, which is about 12% of the 6,000 billion cubic feet of gas reserves owned or controlled by Panhandle (R. 27). Panhandle, however, claims that the proposed transfer will result in a net decrease in its reserves of less than 5%. This is apparently based on the assumption that Panhandle in 1965 will exercise its option to purchase from Hugoton the 400 billion cubic feet of gas which the Panhandle-Hugoton contract contemplated would then remain. *Supra*, p. 6. But whether the 400 billion cubic feet will then remain or be then divertible to Panhandle depends on the needs of the Kansas Power & Light Company, which Hugoton contracted to supply (*supra*, p. 6), and the requirements of the state regulatory commission. In any case, the proportion of Panhandle's total reserves represented by the acreage here involved is irrelevant in the present posture of the case. The factor will become material only on the substantive question of whether the transfer should be permitted if and when it be held that the Commission does have jurisdiction over such transactions.

*supra*, p. 5, fn. 3. These certificates were issued upon the finding by the Commission based on these representations that Panhandle had adequate reserves to warrant its expansion. 5 F. P. C. 544, 546; 949, 952 (F. P. C. Docket No. G-706, orders of June 4, 1946 and of November 30, 1946); F. P. C. Docket G-876, order of June 10, 1948, *supra*, p. 5.

In these circumstances, the transfer of these reserves may, depending on the evidence adduced at the hearing, constitute a violation of the obligations under Section 7(c) of the Act and the Commission's orders issuing these certificates requiring that the reserves so represented as being available to furnish the augmented service, be kept available to furnish such service.<sup>17</sup> Cf. *City of Jamestown v. Pennsylvania Gas Co.*, 1 F. 2d 871, 882 (C. A. 2). Similarly, these gas reserves were included, on the basis of Panhandle's representations, as "used and useful property" in rate base determined by the

<sup>17</sup> The court below, in rejecting such an implied obligation on the ground that if it existed, it would extend to outworn truck and obsolete drilling machines (R. 79) failed to appreciate the vast difference in importance between such equipment and natural gas in the operation of a natural gas pipeline system. Trucks and drilling machines are merely incidental pieces of equipment and, in contrast to natural gas reserves, need not be detailed in applying for a certificate of public convenience and necessity. On the other hand, natural gas is the life blood of a natural gas company, and indeed, the availability of gas determines the very existence and operation of the company. While the physical life of pipeline is comparatively long (60 years or more), gas reserves are exhaustible in a much shorter period, with the result that the service life of a natural gas company's facilities is limited by the life of its gas reserves. Cf. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 597.

Commission in connection with its investigation into Panhandle's rates, and to date Panhandle has received from its customers in excess of \$665,000 to compensate it for the costs of maintaining these leases. *Supra*, p. 5. Depending on the facts developed during the investigation, the transfer of the reserves which cost Panhandle only \$162,564.90 (R. 37), might in these circumstances violate that rate order.

4. In prejudging the Commission's jurisdiction and holding that the Commission is without jurisdiction over the transfer of reserves by a natural gas company, regardless of the circumstances or effects of such disposition, the court below has provided a loophole in the statutory scheme which natural gas companies producing all or part of their own gas have unsuccessfully sought from this Court and Congress, namely, to obtain, at the expense of ultimate consumers, increased revenue consisting of the difference between actual cost and the increasing field value of such gas, which now is substantially higher. In *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581; and *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U. S. 635, the companies urged that they were entitled to field price for this gas on the ground that the inclusion of such gas at actual cost in fixing rates involves regulation of production and gathering of gas, contrary to the mandate of Section 1(b); this Court rejected that conten-

tion (324 U. S. at 597-604, 648-649).<sup>18</sup> Subsequently, bills were introduced into Congress (S. 734, S. 1028, H. R. 4051,<sup>19</sup> 80th Cong., 1st sess.) to amend the Natural Gas Act so as to require the Commission to allow as an operating expense, "the prevailing market price" of such gas. H. R. 4051 was passed by the House on July 11, 1948. 93 Cong. Rec. 8751. Upon reference of the bill to the Senate Committee on Interstate and Foreign Commerce (93 Cong. Rec. 8760), and after extensive hearings, at which the potential increased costs to consumers were discussed (see Hearings before Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2d sess., on H. R. 4051), that Committee did not report the bill for further action.<sup>20</sup>

In connection with the proposed amendments, and based on the assumption of a 7-cent field price and certain other assumptions, the Bureau of Accounts, Finance and Rates of the Commission analyzed the effect of valuing company-produced gas at "field prices" instead of at actual cost on the

<sup>18</sup> The Court commented (324 U. S. at 601): "Congress of course might have provided that producing or gathering facilities be excluded from the rate base and that an allowance be made in operating expenses for the fair field price of the gas as a commodity. Some have thought that to be the wiser course. But we search the Act in vain for any such mandate."

<sup>19</sup> H. R. 4051 was the so-called Rizley bill.

<sup>20</sup> Senators Moore and Capehart of the subcommittee which held the hearings had favorably reported the bill on April 3, 1948. Senator Stewart, the third member of the subcommittee, filed a separate and unfavorable report.



rates of eleven natural gas companies, including Panhandle. It estimated that the rates of these eleven companies would be increased by about \$56,000,000 per year (\$41,000,000 to regulated customers, \$15,000,000 to unregulated customers) and that Panhandle's rates would be increased by \$8,292,016 per year. Hearings before Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2d sess., on H. R. 4051, pp. 291-318, 338.<sup>21</sup>

#### CONCLUSION

The Commission was entitled to judicial assistance in its inquiry into the question whether the particular disposition of reserves involved in this case had aspects which brought it within the Commission's jurisdiction. The courts below erred in denying the Commission an effective opportunity to investigate the facts in order to ascertain whether it had, or should take, jurisdiction. The decision below raises questions of substantial public importance, affecting the functioning of federal administrative agencies and their relationship to the federal courts in the task of effectuating the intent

<sup>21</sup> Mr. John Jirgal, appearing on behalf of the Independent Natural Gas Association of America, estimated on different assumptions that the rate increases would amount to slightly over \$10,000,000, \$8,000,000 of which would be applicable to regulated business. See Hearings, *supra*, p. 17. The validity of the assumptions on which both analyses are based has been questioned.

of Congress. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Federal Power Commission.*

FEBRUARY 1949.

## APPENDIX

The pertinent provisions of the Natural Gas Act (52 Stat. 821, as amended by 56 Stat. 83, 15 U.S. C. 717 *et seq.*) read as follows:

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

\* \* \* \* \*

SAC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and

regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

\* \* \*

Sec. 7. \* \* \*

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the

jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commis-



sion within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any

qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity: otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

\* \* \* \* \*

SEC. 14. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this Act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or

otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 312 of the Federal Power Act, and make available to State commissions and municipalities, information concerning any such matter.

(b) The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves.

Sec. 19 \* \* \*

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by

filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript, such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modi-

fied or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

\* \* \* \* \*

SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District Court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this Act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the

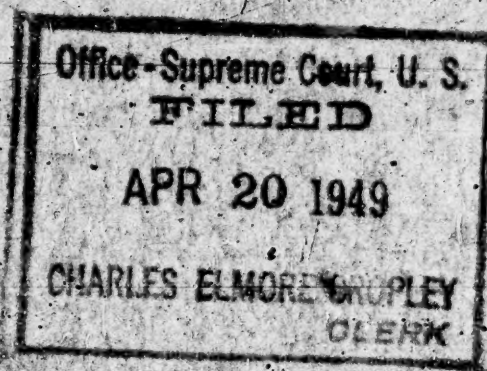


Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Upon application of the Commission the district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this Act or any rule, regulation, or order of the Commission thereunder.

**BRIEF  
for  
the  
F.P.C.**

LIBRARY  
SUPREME COURT U.S.



No. 558

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**FEDERAL POWER COMMISSION, PETITIONER**

**v.**

**PANHANDLE EASTERN PIPE LINE COMPANY, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT**

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**BRIEF FOR THE FEDERAL POWER COMMISSION**

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*In the Supreme Court of the United States*

OCTOBER TERM, 1948

No. 558

FEDERAL POWER COMMISSION, PETITIONER

PANHANDLE EASTERN PET. LINE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The unreported findings of fact, conclusions of law, and opinion of the United States District Court for the District of Delaware appear in the Record at pages 49-50, 60-66. The opinion of the United States Court of Appeals for the Third Circuit (R. 74-81) is reported at 172 F. 2d 57.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1949 (R. 81). The petition for a writ of certiorari was filed on February 10, 1949, and granted on March 28, 1949 (R. 87). The

jurisdiction of this Court rests upon 28 U. S. C. 1254.

#### STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by the Act of February 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717 *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

#### QUESTIONS PRESENTED

The Federal Power Commission instituted an investigation, pursuant to Section 14 of the Natural Gas Act, to inquire into the circumstances surrounding the proposed disposition of certain gas reserves owned by respondent Panhandle, a natural-gas company subject to the Commission's jurisdiction under the Act. The investigation was for the purpose of determining whether the Commission had jurisdiction with respect to the proposed disposition and, if so, whether any Commission action was required. The Commission ordered that the *status quo* be maintained pending the outcome of its investigation, but Panhandle refused to comply with this order. Upon the Commission's application to a district court for an injunction to maintain the *status quo* pending the outcome of its investigation, the court withheld such aid from the Commission. The court below affirmed on the basis of its independent determination that the Commission had no

jurisdiction to exercise control over a natural-gas company's disposition of its gas reserves, and that no conceivable facts which the Commission might find could give it any jurisdiction.

The broad question presented is whether, on the basis of the showing made by the Commission, the courts below were warranted in withholding the interlocutory relief sought. In particular, the question is whether the Court of Appeals erred in holding that the Natural Gas Act on its face precludes the Commission from exercising any control over a natural-gas company's disposition of its gas reserves, regardless of the circumstances, and hence bars the Commission from obtaining judicial aid in maintaining the *status quo* pending the outcome of its investigation.

#### STATEMENT

Respondent, Panhandle Eastern Pipe Line Company (Panhandle), is a "natural-gas company" subject to the jurisdiction vested in the Federal Power Commission by the Natural Gas Act. It owns and operates an integrated natural-gas pipe-line system originating in the Hugoton and Panhandle natural-gas fields of Kansas, Oklahoma, and Texas and extending across the States of Oklahoma, Kansas, Missouri, Illinois, Indiana, and Ohio and into the State of Michigan (R. 3-4). It supplies natural gas to distributing companies along the route of its pipe

lines, serving more than 1,500,000 customers. These distributing companies have supply contracts with Panhandle which are filed with the Commission as rate schedules (R. 4).

In October 1948, Panhandle owned, as part of its integrated pipe-line system, substantial gas reserves, including approximately 96,000 acres of gas leases, located in the Kansas portion of the Hugoton gas field and containing an estimated 700 billion cubic feet of gas (R. 4). In 1942, on the basis of Panhandle's representations that they were "used and useful property," most of these 96,000 acres of reserves, although not developed and not connected with any existing pipe-line system, were included by the Commission in fixing Panhandle's rate base, and delay rentals, renewal bonus payments and all other exploration and development costs relating to these leases were similarly allowed as revenue deductions. *City of Detroit v. Panhandle Eastern Pipe Line Co., In the Matter of Panhandle Eastern Pipe Line Co.*, F. P. C. Dockets G-200, G-207, 3 F. P. C. 273, affirmed, 143 F. 2d 488 (C. A. 8), 324 U. S. 635. To date, more than \$665,000 has been so deducted (R. 7, 12).

In addition, Panhandle has included most of these 96,000 acres among the reserves which it represented to the Commission were adequate to justify the issuance of certain certificates of public convenience and necessity for which it applied during and after 1946 (R. 12-14), pursuant to

Section 7 of the Act, as amended. One instance was its applications for certificates to construct and operate its so-called "Group A and B" facilities (F. P. C. Docket G-706) where it included 71,000 of these 96,000 acres; another, its "Group C" facilities (F. P. C. Docket G-876), where it included all but 1,640 of these 96,000 acres. These facilities, the cost of which was estimated at about \$57,000,000, were designed to augment service to existing customers on Panhandle's system (R. 7, 15). On the basis of these representations, the Commission found, *inter alia*, that Panhandle's gas supply was adequate to meet the requirements of the service to be rendered by means of the proposed facilities and issued the requested certificates (R. 13-14); 5 F. P. C. 544, 546; 949, 952 (F. P. C. Docket G-706; orders of June 4, 1946, and of November 30, 1946); F. P. C. Docket G-876, order of June 10, 1948.

On September 22, 1948, Panhandle caused the creation of Hugoton Production Company (Hugoton); a Delaware corporation (R. 4, 61), the officers, directors and offices (other than the statutory office in Delaware) of which are the same as

Section 57.5 of the Commission's Order No. 99, amending its Provisional Rules of Practice and Regulations under the Natural Gas Act (7 Fed. Reg. 6844) provides:

"Applications for certificates of public convenience and necessity \* \* \* shall set forth \* \* \* the following \* \* \*

"(f) A statement of the gas reserves which are to supply the market which is proposed to be served \* \* \*



those of Panhandle (R. 5, 32, 33). On October 11, 1948, pursuant to an agreement of the same day, Panhandle transferred to Hugoton its right, title and interest in the 96,000 acres of gas reserves in return for 810,000 shares of Hugoton's stock (R. 4-5, 15, 61).<sup>2</sup> Hugoton agreed to proceed promptly to develop this acreage and to attempt to negotiate sales of the gas to purchasers other than Panhandle, subject however to an option in Panhandle to purchase on and after January 1, 1965, at the going market price, all or any specified portion of the gas produced from these reserves which, the agreement contemplated, would then contain 400 of the 700 billion cubic feet of gas estimated to be there now (R. 4-5, 27, 61). On October 18, 1948, seven days later, Hugoton contracted to sell gas from these reserves to the Kansas Power and Light Company, at a minimum price of 12 cents per Mcf, all such gas to be produced from wells located in the State of Kansas and to be consumed by Kansas Power and Light Company or sold by it for consumption wholly within that State (R. 27, 61, 71).

On the same day that the reserves were transferred to Hugoton (October 11, 1948), Panhandle's Board of Directors declared a dividend of 1/2 share

<sup>2</sup> Of the 1,500,000 shares of \$1.00 par value stock authorized, Hugoton issued only 810,000 shares. All the issued stock was to be transferred to Panhandle in accordance with the agreement. Panhandle also paid Hugoton \$675,000 in cash and transferred some small additional oil acreage not here relevant (R. 4, 5, 61).

of Hugoton stock for each share of Panhandle's outstanding 1,620,000 shares of common stock, payable on November 17, 1948, to stockholders of record at the close of business on October 29, 1948 (R. 5, 29-30, 62-63). Notice of this action was immediately sent to Panhandle's stockholders (R. 25, 31-32). Thereafter, Hugoton stock was traded "over-the-counter" on a "when, as and if basis" at approximately \$13.50 per share (R. 26, 37, 63). The Commission was informally advised of these transactions the next day (R. 38). On October 29, Panhandle delivered to Hugoton's transfer agent, stock certificate No. 1 for 810,000 shares of Hugoton common stock registered in Panhandle's name and assigned in blank for transfer to Panhandle's stockholders of record on that day (R. 25-26, 34, 63). By November 13, the date on which the Commission filed its complaint in the district court and secured an *ex parte* restraining order (see *infra*, pp. 8-9), the transfer agent had prepared stock and scrip certificates registered in the names of Panhandle's stockholders, and inserted these certificates in envelopes to be mailed on November 15 and 16 (R. 26).

<sup>3</sup> At that price, the value of the leases transferred to Hugoton was over \$10,000,000 (R. 37). Panhandle's officers estimated that the market price of the stock would increase to \$20.00 per share (R. 37, but see R. 49) which, as applied to the 810,000 shares, represents a market valuation of approximately \$16,000,000 for the leases. The total original cost of these leases was about \$100,000 and the annual expenses of carrying them was about \$67,000 per year (R. 37).

Meanwhile, by order dated October 26, 1948, the Commission instituted an investigation, pursuant to Section 14 of the Act, "of the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said company by Panhandle \* \* \* (R. 11, 63). By supplementary order dated November 10, 1948, the Commission fixed a date for hearing and ordered Panhandle and Hugoton to show cause why they should not be directed to cancel the contract of October 11; to refrain from again transferring these gas reserves without the Commission's consent; and to refrain from paying the Hugoton stock as a dividend, or otherwise transferring it (R. 6, 11-18). The Commission also ordered that the *status quo* be maintained pending final determination of the questions presented (R. 6, 16, 17). Panhandle was advised of the order by telegram and was directed to notify the Commission by November 12 that it would comply with the restraint ordered (R. 7, 21). Panhandle failed and refused to do so (R. 7, 39).

In its complaint filed on November 13 in the United States District Court for the District of Delaware, the Commission, invoking both Section 20 (a) of the Natural Gas Act and the court's general equity powers, prayed that Panhandle be

\*With Panhandle's consent, the Commission's oral motion, made during argument before the district court to amend the complaint to invoke the court's general equity power, was granted (R. 45, 64).

restrained from proceeding further in the stock distribution, and that it be required to maintain the *status quo* pending final determination by the Commission of the questions presented at the hearing before it (R. 1-18).<sup>5</sup> An *ex parte* restraining order was granted (R. 21-23). The district court, thereafter, however, refused to grant a preliminary injunction on the ground that the Commission's complaint, motion, and the affidavits filed by it and by Panhandle (R. 20-21, 24-37) "do not show any basis for the relief sought" (R. 49, 66).<sup>6</sup> On appeal, the court below affirmed (R. 74-81). The primary ground of the opinion

<sup>5</sup> According to an affidavit filed by the Commission in support of injunctive relief, the Chairman of Panhandle's Board of Directors had stated as follows: " \* \* \* the Hugoton Production Company had been organized by Panhandle because the Federal Power Commission had placed the valuable gas reserves of Panhandle in Panhandle's rate base, thereby preventing Panhandle from realizing the full value of said reserves, and that the assignment of gas reserves to Hugoton Production Company and the proposed operating plan of Hugoton Production Company had resulted from careful studies made for the purpose of avoiding regulation of the earnings from the sale of gas produced and gathered from said gas reserves; that if the Federal Power Commission persisted in its present rate fixing methods and procedures, Panhandle might form other production companies similar to Hugoton Production Company which company represented only the start of Panhandle's endeavor to realize additional and unregulated profits for its stockholders from its gas reserves; \* \* \* " (R. 37).

The making of that statement was denied in an affidavit filed by Panhandle (R. 48-49).

<sup>6</sup> The district court permitted the intervention of several of Panhandle's stockholders as defendants (R. 64-65).



below was that Section 1 (b) of the Act exempting "production or gathering of natural gas" from Commission jurisdiction withdrew from the Commission any authority to institute an investigation into the circumstances surrounding a natural-gas company's disposition of gas reserves, and that no conceivable facts which the Commission might find in the course of its investigation could warrant the injunctive assistance of the court. Pending final disposition of the case by this Court, distribution of the Hugoton stock and further transfer of the reserves have been stayed (R. 83).

#### SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a federal court shall, in the first instance, independently determine the scope of the jurisdiction of a federal administrative agency when the latter seeks injunctive assistance to maintain the *status quo* pending the outcome of an investigation instituted by such agency.

2. In holding that the facts of this case do not call for the exercise of the court's equitable powers to maintain the *status quo* pending the outcome of the Commission's inquiry.

3. In failing to hold that there is a reasonable basis in the Natural Gas Act for Commission jurisdiction over a natural-gas company's disposition of its gas reserves.

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\* The State Corporation Commission of the State of Kansas was permitted to intervene in the court below (R. 74).



4. In holding that under the Natural Gas Act, the Commission has no jurisdiction in any circumstances over a natural-gas company's disposition of its gas reserves.

5. In affirming the judgment of the District Court.

#### SUMMARY OF ARGUMENT

This case involves the refusal of federal courts to lend their assistance to the Commission to maintain the *status quo* pending the outcome of its investigation into whether the disposition of certain gas reserves by Panhandle to Hugoton violated the Natural Gas Act. This denial of aid was based primarily on an erroneous reading of the "production or gathering of natural gas" exemption in Section 1 (b) of the Act as withholding from the Commission any possible regulatory authority over a natural-gas company's dispositions of its gas reserves, regardless of the circumstances. The other grounds of the holding below, as well as the various contentions of the respondents, present no obstacle to the granting of the assistance sought.

#### I

A. In construing the "production or gathering of natural gas" exemption as denying to the Commission authority over a natural-gas company's disposition of natural-gas reserves, the court below improperly rewrote the exemption to apply to production and gathering facilities and disregarded the limited application and purpose of the exemp-

tion, as manifest from the Act and its legislative history. Several provisions of the Act affirmatively vest jurisdiction in the Commission in regard to production and gathering properties, including gas reserves. These provisions were ignored by the court below in holding that the Section 1 (b) exemption has a "pretty wide meaning," embracing all production and gathering facilities. Moreover, the Act's legislative history makes it plain that the purpose of Congress in enacting the Act was to provide a comprehensive scheme of complementary regulation, state and federal, of natural gas companies. It further reveals, as this Court has recognized, that the purpose of the Section 1 (b) exemption was not to frustrate this scheme, or leave substantial gaps therein, but rather to leave to the states regulation over the matters of local concern, i. e., "the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern." *Interstate Natural Gas Co. v. F. P. C.* 331 U. S. 682, 690; See, also, *Colorado Interstate Gas Co. v. F. P. C.*, 324 U. S. 581, 602-605.

B. Read in accordance with its limited scope and purpose, the "production or gathering of natural gas" exemption clearly was not intended to deny to the Commission any jurisdiction to inquire into dispositions of gas reserves, with a view towards taking such regulatory action as the

facts found, might require. Such jurisdiction does not involve matters of local concern, regulated by the states, as the various state statutes cited reveal. In none of these statutes relating to proration and conservation of natural gas, including that of Kansas, the state where the gas reserves here involved are located, is there any attempt made to regulate the disposition of such reserves. And the "deep concern" in regard to such transfer, expressed by the State Corporation Commission of Kansas falls far short of a claim of a right on the part of that Commission to control such disposition.

On the other hand, Commission control over a natural-gas company's disposition of its gas reserves might be necessary for effective exercise of its authority. The absence of such jurisdiction would result in substantial gaps in the comprehensive regulatory scheme envisaged by Congress. For example, the lack of Commission control over such dispositions, regardless of the circumstances, might enable a company to disable itself from rendering service and thereby abandon service in whole or in part without Commission approval, contrary to the mandate of Section 7 (b) of the Act forbidding such abandonments "without the permission and approval of the Commission first had and obtained."

Commission control is also necessary to enable the Commission to prevent a natural-gas company from repudiating its dedication of such gas reserves to the discharge of its obligations as a

public utility. Panhandle has so dedicated the reserves here involved by listing them in support of applications for certificates of public convenience and necessity as "gas reserves which are to supply the market which is proposed to be served" and by representing them in the course of the Commission's rate investigation as "used and useful property" includible in the rate base. Power in the Commission to enforce such dedication is "necessary or appropriate to carry out the provisions of" the Act since it is "in the interests of the public" and "in harmony with the purposes of the Act." Section 16; cf. *F. P. C. v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 585. The existence of this power is expressly confirmed by the legislative history of the 1942 amendment to Section 7 where Congress omitted a proposed subsection expressly granting such power to the Commission, with the comment that "It is believed that the meaning of the bill, with these changes, is substantially the same as before." H. Rep. No. 1290, 77th Cong., 1st sess., pp. 4-5. The absence of such power, particularly in the situation here presented would enable an applicant for a certificate to dispose of its gas reserves immediately after the certificate was issued. As a result, the statutory requirement that the Commission make findings as to ability to perform would be meaningless, and its jurisdiction over the constructions and extension of facilities, futile.



Finally, Commission control over such dispositions is essential to protect its rate-making functions as approved by this Court. Such power is likewise "necessary or appropriate to carry out the provisions of the Act." Section 16. In the absence of such control, the Commission's power to include a natural-gas company's production and gathering facilities in the rate base at original cost would, for all practical purposes, be thwarted, and the Commission would be frustrated in striking a proper balance between the investors' and consumers' interests in thus fixing just and reasonable rates. Ratewise, the effect of holding that the Commission is without this power will be substantially to increase rates to ultimate consumers, as evidenced by the sharp contrast between the \$10,000,000 market valuation and \$160,000 original cost of these reserves.

## II

Since the Commission does have jurisdiction to investigate a natural-gas company's disposition of its gas reserves and to take such regulatory action as the facts may warrant, the district court erred in denying the injunction sought by the Commission and in refusing to lend its assistance to enable the Commission to proceed.

A. The injunction should have been granted to enforce the Commission's order of November 10 directing Panhandle to maintain the *status quo*. Section 20 (a) of the Act, providing that the



Commission may seek judicial assistance to enjoin any person "engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation or order thereunder" is squarely applicable. The contrary holding of the court below is based solely on its erroneous reading of the Section 1 (b) exemption.

Panhandle's attack on the validity of this order on other grounds was properly rejected below. Contrary to Panhandle's contention, the order of November 10 did not involve the exercise of judicial power any more than a Commission order directing a natural-gas company to reduce its rates or prohibiting a company from abandoning service. Such orders bear only a superficial resemblance to mandamus and injunction. Moreover, the absence of power in the Commission to require compliance or to assess penalties for failure to comply further distinguishes an administrative from a judicial order. Nor does an order enforceable under Section 20 need to be reviewable under Section 19 (b). The language of Section 20, as well as that of other sections, particularly Section 16, makes it clear that the orders enforceable under Section 20 include many not reviewable under Section 19 (b). Interlocutory orders, issued under Section 16, to be effective, must necessarily be enforceable under Section 20; otherwise, the authority to issue such orders would be a nullity.

B. Even apart from Section 20, the court should have granted the injunction in the exercise of its general equity power. Here again, affirmation by the court below of the district court's action was based solely on its erroneous conclusion that the Commission could not, in any conceivable circumstances, take jurisdiction over the transfer of a gas reserve. The district court unquestionably had the general equity power to assist the Commission to function effectively by maintaining the *status quo* pending the outcome of its investigation of possible statutory violations. The traditional basis for granting of such relief is available when an administrative agency is requesting judicial assistance in order to be able to function effectively in carrying out Congressional policies. And the situation here presented called for the exercise of that power. The proposed investigation might disclose that the disposition of the reserves is inconsistent with the public interest, that it violated the Natural Gas Act, and that it would cause great and irreparable injury to the public served by the Panhandle system. Since the Commission was seeking the injunctive relief to protect the public interest, the equitable powers of the court assumed an even broader and more flexible character than when only a private controversy is at stake.

C. The various contentions of Panhandle's stockholders were properly rejected by the court below. The Panhandle-Hugoton transaction was

not "a thing done." Under the Uniform Stock Transfer Act, which all parties agree is here applicable, title to the stock had not been transferred to the stockholders. The stockholders had not received the certificates and the Act clearly provides that the shares of stock were to be represented by the certificate and that title to the shares could be transferred only by delivery thereof. Delivery of the block certificate to the transfer agent was not delivery to Panhandle stockholders; the transfer agent was simply Panhandle's agent to make delivery to the transferees and was not an agent of the stockholders.

Moreover, the intervening stockholders had no equitable rights warranting the denial to the Commission of injunctive assistance. They had not purchased the stock for value in good faith. They had paid nothing for the stock and hence their position as intended recipients of a dividend, which Panhandle was not obliged to declare was somewhat analogous to that of a donee. In any case, whatever equitable rights they had were far outweighed by the countervailing public interest here in maintaining the *status quo* pending the outcome of the Commission's investigation. Any hardship suffered by the stockholders resulted from Panhandle's delivery of the block certificate to the transfer agent on October 29 notwithstanding due notice of the Commission order of October 26 instituting the investigation.

## ARGUMENT

In this case, the Commission has instituted an investigation into the facts and circumstances surrounding Panhandle's proposed disposition of certain natural-gas reserves to Hugoton for the purpose of determining whether the proposed transfer violated the Natural Gas Act or Commission orders issued thereunder or required Commission action in order to protect the public interest. Ancillary thereto, the Commission ordered Panhandle to stay its hand and maintain the *status quo*. Upon Panhandle's refusal to comply, the Commission sought the assistance of a district court to enforce compliance with its order and to maintain the *status quo* pending the outcome of the investigation. The district court refused to lend its aid to the Commission and denied the requested injunction.

The affirmance by the court below of the district court's action was based, not on a lack of power in the court to grant the relief sought or on countervailing equitable considerations, as urged by Panhandle and its stockholders, but rather on its construction of the Natural Gas Act, particularly the provision of Section 1 (b) exempting from Commission jurisdiction "the production or gathering of natural gas." The court below read this provision as a flat denial to the Commission of any authority to inquire into a natural-gas company's disposition of any of its gas leases and reserves, regardless of the



facts, purposes, or adverse effects on the public and on the ability of the Commission to exercise effectively its expressly granted regulatory jurisdiction.

Since the court below based its ruling on its interpretation of the "production or gathering of natural gas" exemption in Section 1 (b), we shall deal with this question first. We show in Point I that the court read the statute incorrectly. The court failed to consider the exemption's purpose, its relation to the text of other provisions of the Act and its legislative history, all of which clearly demonstrate that the exemption is limited in both scope and purpose and was not intended to deny the Commission such authority as would be necessary to regulate natural-gas companies effectively. We show that jurisdiction over dispositions of gas reserves is, in at least some circumstances, necessary to effective exercise of the Commission's admitted powers, and hence that it was authorized to investigate and take such action with respect to this transaction as the facts might warrant.

In Point II, we show that, under familiar principles governing the relationship of courts and administrative agencies in effectuating the legislative policy, the injunctive assistance requested by the Commission, either under Section 20 (a) of the Natural Gas Act or under a court's general equity powers, should have been granted readily and in a spirit of cooperation, in order to enable



the Commission to complete its administrative inquiry and to determine whether the facts unearthed by the investigation called for any Commission action. Finally, we discuss the claim of Panhandle's stockholders—rejected by the court below—that the transaction had gone too far to be enjoined and demonstrate that this claim is without foundation.

## I

THE COURT BELOW ERRED IN HOLDING THAT THE NATURAL GAS ACT ON ITS FACE WITHHOLDS FROM THE COMMISSION JURISDICTION OVER EVERY CONCEIVABLE DISPOSITION OF NATURAL-GAS RESERVES

Section 1 (b) of the Act specifically excludes from the jurisdiction of the Commission (1) "the local distribution of natural gas" (2) or "the facilities used for such distribution" (3) or "the production or gathering of natural gas." Admittedly, neither of the first two exclusions is involved here—there is no question as to the local distribution of natural gas or the facilities used for such distribution. The holding below that the Commission is without authority to regulate transfers of gas reserves by natural-gas companies, regardless of the facts, circumstances, purposes or adverse effects on effective regulation, is based primarily—and respondents likewise rely most heavily (Panhandle Br. in Opp., pp. 4-5; Kansas Br. in Opp., pp. 6-9)—on the proposition that gas reserves fall within the exemption in Section 1 (b) of the Act, excluding "production or

gathering of natural gas" from the jurisdiction otherwise vested by the Act in the Commission. The court below held (R. 76-77):

It would certainly seem from the first half dozen readings of these exclusionary words in the statute that Congress has pretty clearly taken out from its operation and left to state regulation [citing cases and state statutes] the subject-matter of the Panhandle-Hugoton transaction.

\* \* \* It is pretty hard to see why such leases are not facilities used in the production of natural gas. The word "facilities" has a pretty wide meaning as one looks it up in the dictionary and a glance at the use of the term in court decisions indicates no narrowing of the breadth of the term. We have no reason to think that Congress meant it to be narrowly applied here.

By reading the term "facilities" as applying to the "production or gathering" exemption, the court below erroneously disregarded the text of the provision which clearly shows that the term "facilities" is applicable only to "local distribution of natural gas," and is inapplicable to "production or gathering." Moreover, the court below attempts to define the scope of the exemption merely by reference to the words of the exemption as set out in Section 1 (b); if the court had referred to the purpose of the exemption, as manifested in other provisions of the Act as well as in the legislative

history, the error of its construction would have been patent. As a consequence of its failure to go beyond what it deemed to be the clear words of the statute, the Court of Appeals' reading of the exemption is unduly broad, and creates substantial gaps in the comprehensive scheme of complementary regulation, state and federal, which, as this Court has recognized, Congress intended to establish in enacting the Natural Gas Act.

A. THE "PRODUCTION OR GATHERING OF NATURAL GAS" EXEMPTION IS LIMITED IN SCOPE. IT IS INTENDED SOLELY TO PRESERVE STATE REGULATORY POWERS, AND NOT TO CREATE GAPS IN THE COMPREHENSIVE REGULATORY SCHEME ESTABLISHED BY THE ACT

1. The Natural Gas Act shows on its face that the "production or gathering" exemption was not intended to extend to all phases of production or gathering and everything related thereto, or to deprive the Commission of jurisdiction over the production and gathering properties or facilities of a natural gas company where such jurisdiction is necessary for effective regulation and where there is no conflict with local regulation. This is clear from the specific exemptions set out in Section 1 (b), of "the local distribution of natural gas or the facilities used for such distribution or the production or gathering of natural gas." The absence of any exemption for facilities used for production or gathering, comparable to that provided for local distribution facilities, shows that,

even on the face of Section 1 (b), the exemption embraces only the *activities* of production and gathering and not the *facilities* used therefor.

In addition, the Act contains numerous provisions affirmatively vesting jurisdiction in the Commission in regard to both production and gathering properties and gas reserves. Thus, Section 6, which is related to the Commission's rate-making powers, extends to all the property of a natural-gas company; subsection (a) authorizes the Commission to "investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property," and subsection (b) requires every natural-gas company, upon request, to file with the Commission "an inventory of all or any part of its property and a statement of the original cost thereof."

Similarly, Section 8 (a), in authorizing the Commission to prescribe uniform and correct accounting for natural-gas companies, extends to all the property of such companies.<sup>8</sup> Under Sec-

<sup>8</sup> Section 8 (a) of the Act is identical with and was taken from Section 301 (a) of the Federal Power Act. In reporting out the latter, the Senate Committee on Interstate Commerce stated (S. Rep. No. 621, 74th Cong., 1st Sess., p. 53) that "the authority of the Commission over the accounts of companies under its jurisdiction extends to the entire business of such companies."



tion 9 (a), the Commission is authorized to determine, and to fix by order the proper and adequate rates of depreciation and amortization "of the several classes of property of each natural-gas company used or useful in the *production*, transportation, or sale of natural gas."

Furthermore, Section 10 (a) authorizes the Commission to require natural-gas companies to file reports giving full information as to assets and liabilities as well as the cost of maintenance and operation "of facilities for the *production*, transportation, or sale of natural gas." Section 5 (b) provides that the Commission "may investigate and determine the cost of the *production* or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas."

Finally, Section 14 (b) authorizes the Commission, after hearing, to determine "the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company \* \* \*; and [the Commission] may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all *delay rentals* or other forms of rental or compensation for unoperated lands and leases." It further provides that the Commission, for purposes of such determinations, may require each natural-

\* Unless otherwise indicated, the italics in this brief are supplied.



gas company to file copies of "all its leases and royalty agreements with respect to such gas reserves."

These provisions, relating as they do to various controls of the Commission in regard to facilities used for production and gathering, make it clear that the Section 1 (b) exemption is not all-inclusive, extending to all phases of production and gathering. And they plainly show that Congress' failure to include "facilities used for" production and gathering when it wrote the Section 1 (b) exemption was not a careless inadvertence. Rather, that omission was the product of a purpose to confer a certain measure of authority upon the Commission with respect to such facilities, depending on what the facts found by the Commission may require.

2. The legislative history of the Act further reveals the narrow scope of the production and gathering exemption and the interrelationship of this exemption to the general grant of Commission jurisdiction. At the outset, it should be noted that the primary purpose of the Act was effectively to regulate interstate transportation and sale of natural gas in interstate commerce for resale, which this Court had made plain (*Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298) were not subject to state regulation. As was stated by the House Committee in reporting the bill which became the Nat-

ural Gas Act: "The basic purpose of [the Act] is to occupy this field in which the Supreme Court has held that the States may not act. \* \* \*

Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions." Report of House Committee on Interstate and Foreign Commerce on H. R. 6586, H. Rep. 709, 75th Cong., 1st sess., pp. 2, 3;<sup>10</sup> see, also, H. Rep. 2651, 74th Cong., 2d sess., pp. 1-3.

As to the "production or gathering" exemption, it is significant that the versions of the natural-gas legislation proposed prior to 1936 contained no such provision.<sup>11</sup> In 1935 this Court

<sup>10</sup> This report was incorporated verbatim in the Report of the Senate Committee on Interstate Commerce. S. Rep. 1162, 75th Cong., 1st sess., accompanying H. R. 6586.

<sup>11</sup> H. R. 11662, 74th Cong., 2d sess., which was different from the law as enacted in its jurisdictional provisions and resembled the 1935 bills did not contain the exemption in its present form but did exempt "The production of natural gas." The phrase "production or gathering" appeared for the first time in H. R. 12680, introduced in the House of Representatives on May 12, 1936, by Representative Lea of California. The Report of the House Committee on Interstate and Foreign Commerce on that bill (H. Rep. 2651, 74th Cong., 2d sess.) states (p. 3):

"Subsection (b) confers jurisdiction upon the Commission over the transportation of natural gas in interstate commerce and the sale of such gas for resale to the public but does not apply to any other sale of natural gas, or deprive a State of any lawful authority now exercised over the distribution and sale of natural gas locally; and exempts from the jurisdiction of the Commission the sale of natural gas for industrial use only."

had held unconstitutional certain attempted federal regulation in the field of conservation of oil under the National Industrial Recovery Act. *Panama Refining Co. v. Ryan*, 293 U. S. 388. This was followed by the enactment of the Connally "Hot-Oil" Act in 1935 (49 Stat. 30; 15 U. S. C. 715-715(1)), and its amendment in 1937 (50 Stat. 257) which was aimed at making effective state proration and other laws relating to conservation or production of oil. The 1937 amendment was under consideration by Congress at the same time as the proposed natural-gas legislation and the status of the conservation problem at the time doubtless influenced the insertion of the "production or gathering" exemption in the Act as finally enacted. And in commenting on the exemption as it appeared in H. R. 6586, the Committee stated (H. Rep. 709, 75th Cong., 1st sess., pp. 2-3):

In view of the importance of section 1 (b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows: "but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribu-

tion or to the production or gathering of natural gas."

The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. That part of the negative declaration stating that the act shall not apply to "the local distribution of natural gas" is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.

Thus, the legislative history clearly demonstrates that Congress was seeking to bridge the gap revealed by the *Attleboro* case and to occupy the entire field in which this Court had held the states could not act. See *infra*, pp. 34-36. It further demonstrates that Section 1 (b) exemptions were not intended to curtail the Commission's power over matters of national concern, but rather to preserve to the states the areas in which it had been previously held they could

operate. Cf. *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23.

3. Recognizing the exemption's limited purpose, this Court has attributed to the "production or gathering" exemption a scope far narrower than the "pretty wide meaning" ascribed by the court below and has recognized that as an "exception to the primary grant of jurisdiction in the section [the exemption is] to be strictly construed." *Interstate Natural Gas Co. v. F. P. C.*, 331 U. S. 682, 690-691; *Colorado Interstate Gas Co. v. F. P. C.*, 324 U. S. 581; *Panhandle Eastern Pipe Line Co. v. F. P. C.*, 324 U. S. 635; *F. P. C. v. Hope Natural Gas Co.*, 320 U. S. 591; *F. P. C. v. Natural Gas Pipeline Co.*, 315 U. S. 575; cf. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507; see, also, *Hartford Electric Light Co. v. F. P. C.*, 131 F. 2d 953, 962 (C. A. 2), certiorari denied, 319 U. S. 741. This recognition not only accords with the Act's legislative history, but also adheres to "the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial process intended to be accomplished by the enactment." *Spokane & Inland R. R. v. United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry. Co. v. Comm'n*, 286 U. S. 290, 311-312; *United States v. McElvain*, 272 U. S. 633, 639; see, also, *Hartford Electric Light Co. v. F. P. C.*, 131 F. 2d 953, 962 (C. A. 2),



certiorari denied, 319 U. S. 741; *People's Natural Gas Co. v. F. P. C.*, 127 F. 2d 153 (C. A. D. C.).

In accordance with the narrow scope properly to be ascribed to the production and gathering exemption, this Court in the *Colorado Interstate* and *Panhandle* cases rejected the companies' contention that the exemption precluded the Commission from considering their production and gathering properties in passing on the reasonableness of their rates. It held, notwithstanding the exemption, that the Commission could include production and gathering properties in the rate base at original cost, and the cost of producing and gathering natural gas in the operating expenses. See, also, *F. P. C. v. Hope Natural Gas Co.*, 320 U. S. 591, 607-609. And in the *Interstate* case, the Court unanimously held the sale of natural gas made in the field by a producer to a natural-gas company, which in turn transported the gas so purchased to out-of-state markets, was subject to the Commission's jurisdiction. Here again, the principal contention advanced by the company was that the sales involved related to production and gathering of natural gas and hence fell within the ambit of the Section 1 (b) exemption, and here again this Court rejected that contention, 331 U. S. 682.

In discussing the "production or gathering" exemption in these cases, the Court pointed out that, in denying the Commission jurisdiction to regulate the production and gathering of natural

gas, "it was not the purpose of Congress to free companies from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority.' \* \* \* Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern." *Interstate* case at 690; see, also, *Colorado Interstate* case at 602-603.

In recognizing the limited scope of the Section 1 (b) exemption, the Court has sought to give effect to the purpose of the Natural Gas Act to provide for a completely comprehensive system of complementary federal and state regulation. "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation and in no manner usurping their authority. *Public Utilities Comm'n v. Gas Co.*, 317 U. S. 456, 467;

*Power Comm'n v. Hope Gas Co.*, 320 U. S. 591, 609-610; *Interstate Gas Co. v. Power Comm'n*, 331 U. S. 682, 690. And, as was pointed out in *Power Comm'n v. Hope Gas Co.*, *supra*, at 610, "the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." The scheme was one of cooperative action between federal and state agencies." *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U. S. 507, 532.

The foregoing demonstrates, we submit, that the "production or gathering of natural gas" exemption has a limited scope, extending only to the activities of production and gathering. It further demonstrates that the purpose of the exemption was to preserve to the states areas of control in which they are competent to act and not to leave a gap in the comprehensive system of dual regulation of natural-gas companies.

B. COMMISSION JURISDICTION OVER TRANSFERS OF GAS RESERVES IS FOUNDED ON SPECIFIC PROVISIONS OF THE NATURAL GAS ACT, IS CONSISTENT WITH THE SECTION 1(b) EXEMPTIONS, AND ACCORDS WITH THE PURPOSE OF THE ACT

When the "production or gathering of natural gas" exemption is read in accordance with its limited scope and purposes, it becomes clear that the exemption was not intended to deny to the Commission jurisdiction over a disposition of gas reserves, if the facts which the Commission might find should require some regulatory ac-

tion. Such jurisdiction does not conflict with matters of local concern, left to state regulation and control, and is essential for effective regulation by the Commission on a national scale in accordance with the purpose of the Natural Gas Act.

1. Contrary to the impression of the court below (R. 76), the states do not attempt to regulate the transfer or disposition of gas leases or reserves. While several states, such as the State of Kansas where the gas reserves here involved are located, have statutes relating to proration and conservation of natural gas for the purpose of preventing uneconomic development and waste of this natural resource, none of these statutes attempts to regulate the transfer of gas leases. See, *e. g.*, Kansas Gen. Stat., c. 57, §§ 701-713 (Supp. 1947); Mich. Stat. Ann., c. 97 (Supp. 1947); Okla. Stat. Ann., Tit. 52, c. 3, §§ 231-247; Texas Rev. Civ. Stat., Tit. 102, § 6008 *et seq.* (Vernon 1925 with Supp. 1948); see also La. Gen. Stat., Secs. 4766-4826.2; cf. *Interstate Natural Gas Co. v. F. P. C.*, 331 U. S. 682, 691.

Nor does the Kansas State Corporation Commission which has intervened in this proceeding claim such power. In its petition for leave to intervene in the court below, it stated that it had the duty to regulate the taking of natural gas in order to prevent waste and to achieve "the orderly development in and of any common source

of supply" (R. 70) and that in accordance therewith, it issues monthly proration orders regulating the production of natural gas from the Kansas Hugoton field (R. 71). The State Commission further stated it has "encouraged" the free interchange of leases as "it helps to prevent undeveloped islands of productive acreage and is an important factor in securing orderly development" of the field (R. 72). And in this Court, that commission has asserted only that "It has no more than an observer's interest in the stock transfers \* \* \*. It is deeply concerned with the jurisdictional questions relating to the transfer by Panhandle to Hugoton of gas and gas-and-oil leases covering acreage in the Kansas Hugoton Field" (Br. in Opp., p. 4). Such "encouragement" and "deep concern" fall far short of a claim or assertion of a right on the part of the State Corporation Commission to regulate or control the transfer of gas reserves and leases. Accordingly, there is no conflict or interference with the exercise by the state of a lawful regulatory function. Cf. *Interstate Gas Co. v. F. P. C.*, 331 U. S. 682, 690, 694-692.

2. The existence of Commission control over a natural-gas company's disposition of its gas reserves is necessary for effective regulation from several different aspects. The absence of such jurisdiction would result in substantial gaps in the comprehensive regulatory scheme of the nat-



ural-gas industry envisaged by Congress.<sup>12</sup> At this point it should be observed that the Commission is not now claiming that the disposition of the reserves here involved would necessarily have adverse effects on Commission regulation. The effect of the disposition of these reserves will not be ascertainable until after the facts and evidence in regard thereto have been developed in the course of the investigation in aid of which the Commission is here seeking judicial assistance.

(a) Commission control over a natural-gas company's disposition of its gas reserves is clearly within its authority under Section 7 (b) of the Natural Gas Act. That Section provides:

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available sup-

<sup>12</sup> The Commission's disclaimer of control over production and gathering quoted by the court below (R. 78) merely paraphrases the statutory language and was not broader in scope than the statutory exemption itself. Similarly, the statement below that "It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases" (R. 78) does not reflect the full picture. Until this time, such trading has taken place with the view of blocking in reserves and improving service (R. 72), and so far as the Commission is presently aware, not to achieve results which would derogate from the Commission's jurisdiction. See pp. 35-53.

ply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Inasmuch as natural gas is the lifeblood of a natural-gas system and its availability is fundamental to the continued operation of a natural-gas company, control over the company's disposition of its gas reserves is essential to prevent a company from abandoning service "without the permission and approval of the Commission first had and obtained." If the Commission lacks such power, a company may, by disposing of its gas reserves, disable itself from rendering service and thereby, for all practical purposes, abandon service in whole or in part without Commission approval, contrary to the mandate of Section 7 (b). The result would be at least a substantial limitation on the Commission's control over abandonments of service.<sup>13</sup>

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<sup>13</sup> The 96,000 acres here involved are estimated to contain 500 billion cubic feet of natural gas, which is about 12% of the estimated 6,000 billion cubic feet of gas reserves owned or controlled by Panhandle (R. 27). Panhandle, however, says that the transfer will result in a net decrease in its reserves of less than 5%. This is apparently based on the assumption that Panhandle in 1965 will exercise its option to purchase from Hugoton the 400 billion cubic feet of gas which the Panhandle-Hugoton contract contemplated would then remain. *Supra*, p. 6. But whether the 400 billion cubic feet would then remain or be then divertible to Panhandle depends on the needs of the Kansas Power & Light Company, which Hugoton contracted to supply (*supra*, p. 6), and the require-

(b), (i) Control over a natural-gas company's disposition of its gas reserves is necessary to enable the Commission to prevent a natural-gas company from repudiating its dedication of such gas reserves to the discharge of its obligations as a public utility. Under Section 7 (e) of the Act the Commission is required to issue a certificate of public convenience and necessity for the construction or extension of natural-gas facilities to any qualified applicant "if it is found [among other things] that the applicant is able and willing properly to do the acts and to perform the service proposed \* \* \*." Since, as we indicated, *supra*, ability to serve is dependent largely upon the availability of natural gas, the Commission, to determine whether an applicant is qualified and able and willing properly to do the acts, has required, as authorized by Section 7 (d), that applicants for such certificates show "the gas reserves which are to supply the market which is proposed to be served." See *supra*, p. 5.<sup>14</sup> In compliance with this requirement, Panhandle has, in hearings on three applications for certificates of public convenience and necessity seeking augmentments of the state regulatory commission. In any case, the proportion of Panhandle's total reserves represented by the acreage here involved is irrelevant in the present posture of the case. The factor becomes material only on the substantive question of whether the transfer should be permitted if and when it be held that the Commission does have jurisdiction over such transactions.

<sup>14</sup> The Commission has denied certificate applications because of inadequate reserves.

thority to construct additional facilities costing about \$57,000,000, included most of the acreage here involved in support of its claim that it had natural-gas reserves adequate to justify the issuance of the certificates sought. F. P. C. Dockets G-706 and G-876; *supra*, pp. 4-5. These certificates were issued upon the finding by the Commission based on these representations that Panhandle had adequate reserves to warrant its expansion. 5 F. P. C. 544, 546, 949, 952 (F. P. C. Docket No. G-706, orders of June 4, 1946, and of November 30, 1946); F. P. C. Docket G-876, order of June 10, 1948, *supra*, p. 5.

Not only were these reserves used to support Panhandle's applications for certificates of convenience and necessity, but Panhandle has also, in the course of the Commission's investigation into the reasonableness of its rates in 1942, represented most of these reserves as "used and useful property" and hence includible in its rate base. Based on these representations, the Commission has permitted these reserves to be included in Panhandle's rate base as "used and useful property," on which Panhandle has since been entitled to and has received a return. Panhandle has also been reimbursed by consumers in excess of \$665,000 for the expenses of holding these reserves.

By so listing these reserves in support of its applications for certificates of convenience and necessity and by so representing them as "used

and useful property" in the rate proceeding, Panhandle has devoted or dedicated, in accordance with long-established principles of public utility law, these reserves to serve the public, that is, to the discharge of Panhandle's public utility obligations, particularly those for the discharge of which the company in its applications for certificates of public convenience and necessity has represented that these reserves would be available. *Martin v. Illinois*, 94 U. S. 113; *Wolff Co. v. Industrial Court*, 262 U. S. 522, 535; *Tyson & Bro. v. Banton*, 273 U. S. 418, 432, 433-434; *Stinson Lumber Co. v. Kuykendall*, 275 U. S. 207, 211; *Ribnik v. McBride*, 277 U. S. 350, 355; *Williams v. Standard Oil Co.*, 278 U. S. 235, 239-240; *United Fuel Gas Co. v. R. R. Comm'n*, 278 U. S. 300, 308, 309; *Georgia Banking Co. v. Smith*, 128 U. S. 174, 179-180; *Cincinnati v. White*, 6 Pet. 431, 439; *Miss. R. R. Comm'n v. Mobile & Ohio R. R. Co.*, 244 U. S. 388, 390-391; cf. *Michigan Commission v. Duke*, 266 U. S. 570, 577.<sup>15</sup>

<sup>15</sup> Accord: *City of Phoenix v. Kasun*, 54 Ariz. 470, 475; *Western Canal Co. v. Railroad Commission*, 216 Cal. 639, 647; certiorari denied, 289 U. S. 742; *Stoehr v. The Natatorium Co.*, 34 Idaho 217, 221-222; *State ex rel. Helm v. Trego County Co-op Tel. Co.*, 112 Kan. 701; *Brooklyn Union Gas Co. v. City of New York*, 50 Misc. 450, 456-457; *Industrial Gas Co. v. Pub. Util. Comm'n*, 135 Ohio St. 408; *Okla. Natural Gas Co. v. Corporation Comm'n*, 88 Okla. 51; *Western Union Tel. Co. v. Cartor*, 93 Okla. 269; *Public Utilities Commission v. East*



The refusal of the court below to hold this common-law characteristic of a public utility applicable to these gas reserves was predicated on the ground that the dedication theory, if applicable, would extend also to outworn trucks and obsolete drilling machines (R. 79). Aside from the fact that the court below was laboring under the misapprehension that the term "facilities" applied to "production or gathering" as well as to local distribution, its refusal also evidenced a complete failure to appreciate the vast difference in importance between such equipment and natural gas in the operation of a natural-gas pipeline system. Whether such a differentiation should be made and its significance in the context of natural gas regulation, are, we submit, for the Commission to investigate and decide, and not the courts below. Some equipment may be merely incidental to the operation of a natural-gas company. Unlike gas reserves, trucks and drilling machines need not be detailed in an application for a certificate of public convenience and necessity. Moreover, in sharp contrast to such equipment, natural gas, as we have already indicated, *supra*, pp. 36-37, is the lifeblood of a natural-gas company. Indeed, the availability of gas determines the very existence and operation of the

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*Providence Water Co.*, 48 R. I. 376, 392; *Rural Elec. Co. v. Bd. Equalization*, 57 Wyo. 451, 471-472; *Wyman, Public Service Corporations* (1911), pp. 167 *et seq*; Recent Case Note, 89 U. of Pa. L. Rev. 1107.

company.<sup>16</sup> While the physical life of a pipe line is comparatively long (60 years or more), gas reserves are exhaustible in a much shorter period, with the result that the service life of a natural-gas company's facilities is limited by the life of its gas reserves. Cf. *F. P. C. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 597.

(ii) That the Commission has power to enforce the public-utility obligations thus undertaken by Panhandle as to these reserves, *i. e.*, to use them for the purpose of rendering adequate service at reasonable and nondiscriminatory rates, is plain. Not only is Section 16 of the Natural Gas Act, empowering the Commission "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act" sufficiently broad to vest this power in the Commission, but the provisions of the Act authorizing the Commission to grant certificates of public convenience and necessity as well as investigate the reasonableness of a natural-gas company's rate implicitly grant such

<sup>16</sup> The Congressional recognition of the fundamental importance of natural gas to a natural-gas company is manifest from Section 14 (b). That Section authorizes the Commission after hearing to "determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company." It further provides that "For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves."

ancillary authority to the Commission. See also Sections 4 (b), 5 (a); cf. *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452; *United Fuel Gas Co. v. R. R. Comm'n*, 278 U. S. 300. As noted by the Court of Appeals for the Seventh Circuit, "Like other legislation of this character, [the Act] should be liberally construed and interpreted, so as to embrace, within its scope, the implied powers necessary to an exercise of the expressly granted powers." *Natural Gas Pipeline Co. v. F. P. C.*, 120 F. 2d 625, 632.<sup>17</sup> While this Court reversed the judgment in that case, it affirmed the holding of the Court of Appeals that the Commission had implicit power to enter interim rate orders. "Since such an order may be in the interests of the public, as well as the regulated company, and is in harmony with the purposes of the Act, it is one which the Commission has discretion to make under Section 16 as appropriate to carry out the provisions of the Act." *F. P. C. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 585; cf. *California v. United States*, 320 U. S. 577, 582-584.

The legislative history of the 1942 amendment to the Act supports the existence of the implicit power in the Commission at least to enforce a

<sup>17</sup> See *United States v. Kelly*, 55 F. 2d 67, 70 (C. A. 2); *Moffat Tunnel Impr. Dist. v. Denver & S. L. Ry. Co.*, 45 F. 2d 711, 723 (C. A. 10), certiorari denied, 283 U. S. 837; cf. *McGrain v. Daugherty*, 273 U. S. 135, 173; *The Employers' Liability Cases*, 207 U. S. 463, 495; *Legal Tender Cases*, 12 Wall. 457, 550.

natural-gas company's obligation to render adequate service. As introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce, that amendment which adds several subsections to Section 7 and enlarges the Commission's certificate power (H. R. 5249, 77th Cong., 1st sess.) contained a subsection (h) providing:

Nothing contained in this section shall be construed to affect the authority of a State within which natural gas is produced to authorize or require the construction or extension of facilities for the transportation and sale of such gas within such State: *Provided, however,* That the Commission, after a hearing upon complaint or upon its own motion, may by order forbid any intrastate construction or extension by any natural-gas company which it shall find will prevent such company from rendering adequate service to its customers in interstate or foreign commerce in territory already being served.

This subsection was included in the proposed amendment at the request of representatives of state regulatory commissions. These commissions had pressed "the desirability of a State having explicit authority to require or authorize gas to be served within that State to the extent that it was produced within that State; but after conferences it was felt by everyone that that power might conceivably be used to cut off inter-

state service \* \* \*, and therefore, to meet that situation a proviso was added" (Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5249, 77th Cong., 1st sess., p. 7).

The Commission took no position as to the desirability of this subsection. It expressed the view at the Committee hearings (*supra*, at p. 22) that if the Committee did

\* \* \* strike out [the two parts of subsection (h)] \* \* \* the Commission will have power under the existing statute to require the maintenance of adequate service in interstate commerce, just as much as it would under this proposed language in the latter part of (h), even though it is not so explicitly spelled out.

The Committee in its report recommending the passage of H. R. 5249 plainly adopted this view of the Commission's implicit powers. It omitted subsection (h), made minor changes in other subsections, and commented (H. Rep. No. 1290, 77th Cong., 1st sess., pp. 4-5):

\* \* \* It is believed that the meaning of the bill, with these changes, is substantially the same as before and that the jurisdiction of the Commission is substantially unchanged by the amendments; but there is clearer protection to the existing jurisdiction of State utility commissions over intrastate matters and the amended language on pages 1 and 2 conforms to the language of the provision



relative to abandonment in section 7 (b) of the Natural Gas Act.

It is believed that the bill, with the committee amendment striking out subsection (h), provides adequate legislation for the present on the subject of certificates of public convenience and necessity. \* \* \*

The Senate Committee on Interstate Commerce recommended that the bill be passed without further amendment (S. Rep. No. 948, 77th Cong., 2d sess.) and the bill was so enacted. 56 Stat. 83.<sup>18</sup> See, also, Hearings on H. R. 11662, 74th Cong., 2d Sess., p. 92 (Testimony of John Benton, General Solicitor, National Association of Railroad and Utility Commissioners).

In this connection, it should be noted that the present proceeding is not the first in which this power to protect the adequacy of service in interstate commerce has been exercised by the Commission. In *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, C. A. 6,

<sup>18</sup> It is interesting to note in this connection that the transfer proposed by Panhandle even when viewed as the company claims it should be (R. 49) parallels and, indeed, is practically the same as the situation dealt with in subsection (h). According to the affidavit of William G. Maguire, the Chairman of Panhandle's Board of Directors, the proposed transfer to Hugoton is for the purpose "of supplying an adequate quantity of gas produced in Kansas for the people of Kansas" (R. 49). Since this result is to be achieved by diverting to purely intrastate service natural gas dedicated to the discharge of Panhandle's obligation of rendering adequate service as a "natural gas company," the present situation differs from that of subsection (h) only in that here Panhandle is

No. 10834 (decided April 7, 1949), the Court of Appeals for the Sixth Circuit refused to order specific performance of Panhandle's contracts to deliver certain quantities of natural gas to Michigan Consolidated in face of the Commission's order directing curtailed deliveries in order to allocate the inadequate gas available. In holding that such matters were committed by the Natural Gas Act to the exclusive jurisdiction of the Commission, the court stated (slip opinion, p. 7):

\* \* \* adequacy and impartiality of service, in the light of existing circumstances, is within Commission control. This must be so if control over rates means anything; since adequate service is a necessary concomitant in the fixing of reasonable rates. If this is so in respect to private utilities it must be even more important in the case of utilities which are affected with a public interest. If the Commission has no authority to order adequate service to customers, in view of all the conditions and circumstances involved, the basic purpose of the Natural Gas Act fails of realization.

And in *City of Detroit v. Panhandle Eastern Pipe Line Co.*, 5 F. P. C. 43, 63 PUR(NS) 213, the

attempting to achieve the diversion voluntarily, and not pursuant to the order of the state regulatory agency. If the Commission has power to prevent a state regulatory agency from requiring such diversion, it *a fortiori* may prevent a natural-gas company from voluntarily diverting the gas.

Commission ordered Panhandle not to make a contract for the direct sale of natural gas to a new industrial consumer where the sales might result in inadequate service in regard to sales subject to the Commission's jurisdiction. The Commission there stated that it—

\* \* \* wished to make it plain that its action in this matter is not to be construed as an attempt to assert jurisdiction over a direct sale of gas as such. However, we do by our action in this matter indicate clearly that, in our opinion, the Natural Gas Act does confer on the Commission jurisdiction over a company found to be a natural-gas company within the meaning of the Natural Gas Act, and over the facilities used by such company in either transporting natural gas in interstate commerce or in the sale of such gas for resale, especially to the extent necessary to enable the Commission to protect the adequacy of service to its customers.

In the instant case there can be no doubt that the entire interstate transmission pipeline system of Panhandle is subject to the jurisdiction of the Commission. Hence, it is for the Commission to determine whether it is contrary to the public interest to permit Panhandle to operate its system for the purposes proposed. If the Commission could not make this determination it would not be able to exercise properly the regulatory authority conferred upon it by Congress. That there has been a clear recognition of this authority by Panhandle is evidenced by the

several applications heretofore filed by it for permission to increase its system sales capacity.

Therefore, it is our view that where, as here, a company has not the capacity to sell a large quantity of gas to a new customer without impairing its ability to render satisfactory service to existing customers, it is the duty of the Commission in protecting the interest of the public to prevent such company from using the facilities subject to its jurisdiction for such purpose. \* \* \*

The absence of such implicit power in the Commission, particularly in the situation where, as here, the reserves being disposed of were presented in support of applications for certificates of public convenience and necessity to show that the applicant was able adequately to serve, would render ineffective Commission jurisdiction over construction and extension of facilities. If an applicant for a certificate could, free of any Commission control, dispose of its gas reserves immediately after the certificate was issued, the Commission's findings as to ability to perform would be without substance or meaning the moment after they were made. These findings would be, for all practical purposes, valueless; and the controls which Congress intended the Commission to exercise through its certificate power would largely be futile.

(c) Finally, Commission control over a natural-gas company's disposition of its gas reserves is

essential to protect its rate-making functions as approved by this Court in the *Hope, Colorado Interstate* and *Panhandle* cases. In the *Hope* case, as in the earlier *Natural Gas Pipeline* case (315 U. S. 575), this Court held that the Act did not bind the Commission to the use of any single formula or combination of formulae in determining rates and that the Commission had discretion to determine which, if any, formula to use, and to make the necessary pragmatic adjustments (320 U. S. 591 at 602). Noting that the primary aim of the Natural Gas Act was "to protect consumers against exploitation at the hands of natural-gas companies" (320 U. S. at 610), and that the fixing of "just and reasonable" rates involves a balancing of the investor and consumer interests (320 U. S. at 603), the Court there approved as nonconfiscatory a rate-reduction order of the Commission grounded on a rate base which included the company's production and gathering facilities at original cost. In the *Colorado Interstate* and *Panhandle* cases, this Court explicitly affirmed that the Commission, in using the rate-base method of fixing just and reasonable rates, could include the company's production and gathering facilities at original cost in the rate base.<sup>19</sup>

<sup>19</sup> The Court there commented (324 U. S. at 601): "Congress of course might have provided that producing or gathering facilities be excluded from the rate base and an allowance be made in operating expenses for the fair field price of



Just as the Commission has implicit power over a natural-gas company's disposition of its gas reserves to enforce the company's obligation to furnish adequate service (*supra*, pp. 42-43), so too, we submit, it has implicit authority over such disposition in order to protect its rate-making functions as defined in the *Colorado Interstate* group of cases. The power so to protect its jurisdiction in the interest of the public and in harmony with the purposes of the Act is a power "necessary or appropriate to carry out the provisions of this Act," vested in the Commission by Section 16. Cf. *F. P. C. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 585.

Thus, such power may be implied as necessary to the exercise of the expressly granted rate-making powers in Sections 4 and 5, for if the evidence developed at the Commission's proposed investigation supports the claim that Panhandle's sole purpose in transferring the gas reserves here involved to its creature Hugoton is to avoid regulation of the earnings from the sale of gas produced and gathered from these reserves and that Hugoton is only the start of Panhandle's endeavor to realize additional and unregulated profits for its stockholders from its gas reserves (R. 37), the Commission, without such ancillary power, would be unable to prevent dispositions of gas reserves the gas as a commodity. Some have thought that to be a wiser course. But we search the Act in vain for any such mandate."

for these purposes. As a result, the Commission's power to include a natural-gas company's production and gathering facilities in the rate base at original cost, would, for all practical purposes, be thwarted, and the Commission would be unable to strike a proper balance between investors' and consumers' interests in thus fixing just and reasonable rates. Cf. *Hope* case at 603.<sup>20</sup>

Ratewise, the effect of holding that the Commission is without power over such dispositions will be substantially to increase rates to ultimate consumers. This is evident from the fact that the Hugoton stock initially, although sold on a "when, as and if" basis, was purchased and sold at \$13.50 per share, thus reflecting a market valuation of these gas reserves which, apart from \$675,000 cash paid by Panhandle, constitute Hugoton's sole assets of about 10 million dollars.<sup>21</sup> In sharp con-

<sup>20</sup> The absence of such power would, by opening a way to circumvention of the Commission's rate jurisdiction, render unnecessary any further efforts to amend the Natural Gas Act to require the Commission to exclude production and gathering facilities from the rate base, and in lieu thereof, to allow as an operating expense, "the prevailing market price" for such company-produced gas. Following the decision in the *Colorado Interstate* case, numerous bills (e. g., S. 734, S. 1028, H. R. 4051, 80th Cong., 1st sess.) directed at so amending the Act have been introduced, but to date, all such bills have uniformly failed of passage.

<sup>21</sup> Of course, if the market price of the stock should increase to \$20 a share, this would represent a market valuation of approximately \$16,000,000 for the leases here involved (R.

trast to this are the facts that Panhandle originally paid only about \$160,000 for the same acreage and that since at least 1942 Panhandle has been entitled to and has received from its ultimate consumers reimbursement for the expense of maintaining these reserves. The difference between the \$10,000,000 market valuation and \$160,000 original cost represents an unearned increment, which, if the transaction is validated, will necessarily be reflected in consumer rates. The consequence of denying that the Commission had implicit power thus to protect its rate-making authority would be clearly to create a substantial gap in the comprehensive regulatory scheme of the Act and to frustrate the Congressional purpose, in enacting the Act, of protecting "consumers against exploitation at the hands of natural gas companies." *Hope* case at 610.

In summary, we respectfully submit that not only was the court below in error in holding that the Natural Gas Act on its face withheld jurisdiction from the Commission to institute an inquiry in respect of a natural-gas company's proposed disposition of its gas reserves, but, on the contrary, that a fair reading of the Act as a whole discloses a legislative intent to confer jurisdiction on the Commission to inquire into such dispositions and in appropriate circumstances to enter such order as the facts found may require.

## THE DISTRICT COURT IMPROPERLY REFUSED TO GRANT THE INJUNCTION. SOUGHT BY THE COMMISSION.

We believe it clear from the foregoing that the Commission has jurisdiction to institute an inquiry into the circumstances surrounding a transfer of the gas reserves of a natural-gas company, and to take such regulatory action as the facts found should warrant. The Government submits, however, that it was unnecessary for the courts below, at this stage of the proceedings, to inquire into and decide the exact basis on which the Commission's jurisdiction can be rested. The requested injunction should have been granted on the Commission's showing that a reasonable basis for jurisdiction exists. The orderly course of the administrative proceedings should first be completed, findings of fact should be made and an appropriate order entered.<sup>22</sup> The

<sup>22</sup> Such limitation on the court's inquiry not only is in harmony with the principle of cooperation between the federal courts and federal administrative agencies, discussed, *infra*, pp. 65-66, but is in accordance with the established rule that the administrative agency is the judge, in the first instance, of the scope of its statutory jurisdiction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Macaulay v. Waterman Steamship Corp.*, 327 U. S. 540; *F. P. C. v. Arkansas Power & Light Co.*, 330 U. S. 802; *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501. This is true both where the problem before the administrative agency is factual in nature and where it

Commission may well find the facts to be such that the public interest does not require that the challenged transfer be set aside or otherwise regulated. If it should hold otherwise, a reviewing court would then have the benefit of the Commission's findings and expert conclusions. All that the Commission has asked is that the *status quo* be maintained until the orderly termination of the administrative process. The refusal of the courts below to extend this aid to the Commission, and to collaborate with the responsible administrative body in seeking to carry out the legislative mandate, is, we submit, palpably erroneous.

is a "purely legal problem" as well. In *F. P. C. v. Arkansas Power & Light Co.*, *supra*, where the Court of Appeals for the District of Columbia had refused to permit the Commission first to pass on the questions there involved on the ground that they were purely legal (156 F. 2d 821; 828), this Court reversed *per curiam*. See, also *Macauley v. Waterman Steamship Corp.*, *supra*, at 544; *Myers v. Bethlehem Shipbuilding Corp.*, *supra*, at 51, and cases cited. Moreover, the fact that the Commission, not a private litigant, was invoking judicial assistance, does not warrant departure from this rule, for the underlying reasons—comity between court and administrative agency, and desirability of orderly procedure—appear equally applicable, whether a private litigant invokes judicial process to interfere with an administrative proceeding, or, where, as here, the administrative agency seeks judicial aid to protect its proceeding. And as this Court has held, federal courts grant an administrative agency's request for assistance upon a finding of only "probable cause," where it is the agency, not a private litigant, which is seeking judicial help. *Oklahoma Press Pub. Co. v. Walling*, *supra*; *Endicott-Johnson Corp. v. Perkins*, *supra*.



A. THE DISTRICT COURT SHOULD HAVE ISSUED THE INJUNCTION TO ENFORCE THE COMMISSION'S ORDER OF NOVEMBER 10 DIRECTING PANHANDLE TO MAINTAIN THE STATUS QUO, AS AUTHORIZED BY SECTION 20 (a) OF THE NATURAL GAS ACT

The Commission in its order of November 10, 1948, after finding that good cause existed for maintaining the *status quo* pending outcome of its investigation, directed Panhandle to refrain "from paying to its stockholders, as a dividend or otherwise, such 810,000 shares of capital stock of Hugoton." Upon Panhandle's failure to notify the Commission that it would comply with this order, the Commission, invoking Section 20 (a) of the Natural Gas Act, filed its complaint in the district court seeking injunctive assistance to enforce that order. In the complaint, it was alleged, and Panhandle has never challenged the accuracy thereof, that Panhandle's "proposed and threatened" distribution of Hugoton's stock "will constitute a violation" of the Commission order of November 10 (R. 7). In these circumstances, the refusal of the district court here to grant the injunctive relief prayed was, we submit, improper.

Section 20 (a), in common with many other regulatory statutes,<sup>23</sup> specifically authorized the

<sup>23</sup> See, e. g., Clayton Act, 38 Stat. 734, 15 U. S. C., Sec. 21; Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C., Sec. 217; Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. Sec. 45 (a); Investment Company Act of 1940, 54 Stat. 842, 15 U. S. C. Sec. 80a-41; Investment Advisers Act of 1940, 54 Stat. 853, 15 U. S. C. Sec. 80b-9; National Labor Relations

Commission to seek judicial assistance to enjoin any person "engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder." It farther provides that "upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond." The situation here involved falls squarely within this statutory provision, and in accordance therewith, the district court should have granted an injunction, restraining Panhandle from violating the Commission order.

The court below approved the district court's refusal to grant the injunction solely on the ground that "if it is not a valid order because beyond Commission jurisdiction, the Commission cannot have court help to enforce it. We have endeavored to set out above why we think an order interfering with the transfer of these leases would go beyond Commission authority" (R. 80). But as has been shown, *supra*, pp. 21-53, the Act does not deny the Commission jurisdiction over transfers of gas leases, where the facts found by the Commission call for some regulatory action. Accordingly, the order was not invalid, and the court below should have directed the granting of the injunction prayed for.

Act, 49 Stat. 453, 29 U. S. C. Sec. 160 (c); Securities Act of 1933, 48 Stat. 86, 15 U. S. C. Sec. 77t (b); Securities Exchange Act of 1934, 48 Stat. 899, 15 U. S. C. Sec. 78u (e).

In holding as it did, the court below explicitly rejected the other contentions advanced by Panhandle to support its claim that the Commission was not entitled to injunctive assistance under Section 20 (a). Panhandle urged that the order of November 10, 1948, was a stay or a restraining order, involving the exercise of Article III judicial power and hence was beyond the Commission's authority. That order, we submit, is within the Commission power as "necessary or appropriate to carry out the provisions" of the Act. Section 16. Moreover, the order no more involved the exercise of judicial power, let alone Article III judicial power, than a Commission order directing a natural-gas company to reduce its rates or prohibiting a company from abandoning service. These orders, of course, require the company either to act affirmatively or to refrain from doing something, and although the courts have tools at their disposal to accomplish similar results, *i. e.*, writs of mandamus, mandatory injunctions and injunctions, it does not follow that the similar administrative tools involve an exercise of Article III judicial power. In this connection, it should be noted that the Commission could not require Panhandle to comply with the order, nor could it assess penalties against Panhandle for failure to comply. Only by applying to a federal court could the Commission's order be given effect and compliance required. See *Fed. Trade Comm'n v. Claire Co.*,

274 U. S. 160, 173-174; *I. C. C. v. Brimson*, 154 U. S. 447, 485; *Western N. Y. & P. R. Co. v. Penn. Refining Co.*, 137 Fed. 343, 349 (C. A. 3), affirmed, 208 U. S. 208; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 613 (C. C. D. Ky.), appeal dismissed, 149 U. S. 777.

Indeed, it is for this reason that the Commission instituted the present proceeding in the courts.

Panhandle further urged that the November 10 order was only interlocutory, that accordingly it was not reviewable under Section 19 (b), and hence that it was not enforceable under Section 20 (a). This contention is equally unsound. The language of Section 20 as well as that of other sections makes it clear that an order need not be reviewable under Section 19 (b) to be enforceable under Section 20 (a). Only "orders" and, even narrower, only certain "orders" satisfying prescribed requirements are reviewable under Section 19 (b). *F. P. C. v. Metropolitan Edison Co.*, 304 U. S. 375, 384.<sup>24</sup> Section 20 (a) provides

<sup>24</sup> "The context in Section 313 (b) [the Federal Power Act equivalent of Section 19 (b)] indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court 'a transcript of the record upon which the order complained of was entered.' The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character

for enforcement not only of orders generally but of rules and regulations as well by authorizing injunctions against "acts or practices which constitute or will constitute a violation of the provisions of this Act or of any rule, regulation, or order thereunder." In addition, Section 20 (b), authorizing the district court to issue writs of mandamus upon application by the Commission, similarly permits the issuance of these writs to enforce compliance "with the provisions of this Act or any rule, regulation, or order of the Commission thereunder." Viewed in this context, it is clear that "orders" covered by Section 20 include a much broader class of order than encompassed by Section 19 (b). Furthermore, Section 16 authorizes the issuance of "such orders, rules, and regulations as [the Commission] may find necessary or appropriate to carry out the provisions" of the Act. Clearly, the orders issued under the authority of Section 16 as "necessary or appropriate" include orders not reviewable under Section 19 (b), and certainly if these orders are to be effective, they must necessarily

dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case" (304 U. S. at 384).

Since an opportunity for a hearing, and the issuance of an order on the basis of a formal record, are prerequisites to reviewability under Section 19 (b), it is obvious that Panhandle's argument would render futile the enforcement of any order where, as here, it was necessary to obtain an immediate restraint. A summary order designed only to preserve the *status quo* is ineffective unless compliance may be enforced immediately.



be enforceable under Section 20. To the extent that valid orders issued under Section 16 be deemed not enforceable under Section 20, Commission authority under Section 16 would be a nullity. And plainly Congress did not intend such an integral part of the regulatory scheme to be thus wholly ineffectual. These various provisions, we submit, demonstrate that "orders" enforceable under Section 20 encompass more than orders which are reviewable under Section 19 (b).<sup>25</sup> Cf. *F. P. C. v. Metropolitan Edison Co.*, 304 U. S. 375, 384-386.<sup>26</sup>

<sup>25</sup> This conclusion is buttressed by the fact that Section 14 (d) makes express provision for judicial enforcement of orders compelling the production of evidence, *i. e.*, subpoenas. These orders are clearly interlocutory and not reviewable under Section 19 (b). This specific provision, for judicial enforcement of such non-reviewable orders, further undermines Panhandle's contention that Congress intended only orders reviewable under Section 19 (b) to be judicially enforceable.

<sup>26</sup> *Mississippi Power & Light Co. v. Staff*, 131 F. 2d 148 (C. A. 5), relied upon by Panhandle, is unique and does not support Panhandle's position. The *Staff* case involved two attempted reviews of the actions of certain employees of the Commission. The first suit was a petition for review filed directly with the Court of Appeals for the Fifth Circuit. That was dismissed as not constituting the type of case reviewable in the first instance by the Court of Appeals. The second case was instituted in the District Court and asked for injunctive relief against the threatened wrongful acts of the Commission employees. There was no federal diversity jurisdiction as such and the suit would be maintainable only if the Federal Power Act created special federal jurisdiction. All that the Court of Appeals held was that special

## B. THE DISTRICT COURT SHOULD HAVE ISSUED THE INJUNCTION IN THE EXERCISE OF ITS GENERAL EQUITY JURISDICTION

The court similarly erred in approving the district court's refusal to grant the requested injunction in the exercise of its general equity power.<sup>27</sup>

This approval was predicated not on the ground that " \* \* \* the equitable powers of the District Court are insufficient" (R. 80) but rather again on the court's holding that the Commission

federal jurisdiction was not conferred by the Power Act upon a district court of the United States to entertain a suit by a public utility to enjoin a threatened illegal action of Commission employees.

<sup>27</sup> While the Commission's complaint originally invoked only Sections 20 (a) and 22 of the Act, the Commission, during oral argument in the district court, was granted leave, with the consent of Panhandle, to invoke the jurisdiction of the court on the additional ground of its general equity powers (R. 45, 64). See *supra*, p. 8, fn. 4.

Panhandle contends that a district court may not invoke its general equity jurisdiction at the behest of the Commission because Section 20's express grant of authority to seek the aid of federal courts is exclusive and precludes granting injunctive relief on general equitable principles. This contention gives no effect to Section 22 of the Act, which provides, *inter alia* that the federal courts shall have jurisdiction of "all suits in equity and actions at law brought to enforce any liability or duty created by" the Act. Moreover, to apply here the maxim *expressio unius, exclusio alterius*, as in effect urged by Panhandle, overlooks the Commission's purpose in seeking judicial assistance here, the absence of which may have serious detrimental effects on the public interest and the Commission's regulatory jurisdiction. In such a situation, restrictive canons of statutory construction are inapplicable. *Securities and Exchange Commission v. Joiner Leasing Corp.*, 320 U. S. 344, 350.

was without jurisdiction over the transfer of any gas reserves. Since, as we have shown, *supra*, pp. 21-53, the Commission does have jurisdiction over at least some transfers of gas reserves, the court below should have reversed the district court's action and not have affirmed its refusal to maintain the *status quo* pending the outcome of the Commission's investigation as to whether the transfers here involved called for exercise of its regulatory authority.

1. It is unquestioned by the court below or by respondents that a federal court has power to assist an administrative agency to function effectively by maintaining the *status quo* pending the outcome of the agency's investigation into possible statutory violations (R. 80). The granting of interlocutory relief by a court to preserve the *status quo* pending the determination of a controversy before it or another tribunal has been a traditional form of equitable relief. *United States v. United Mine Workers*, 330 U. S. 258; *Continental Bank v. Rock Island*, 294 U. S. 648, 675-676; *Babbitt v. Dutcher*, 216 U. S. 102; *Kline v. Burke Constr. Co.*, 260 U. S. 226, 229; *Graselli Chemical Co. v. Aetna Explosives Co.*, 252 Fed. 456 (C. A. 2); *Northern Pacific Ry. v. Soderberg*, 86 Fed. 49 (C. C. D. Wash.). With the creation of administrative agencies charged with the protection of public interests and having standing to protect these interests in court, the courts similarly may assist administrative agencies. *S. E. C.*

*v. U. S. Realty & Improvement Co.*, 310 U. S. 434; *West India Fruit & Steamship Co. v. Seatrain Lines*, 170 F. 2d 775 (C. A. 2), petition for writ of certiorari No. 432, this Term, dismissed on petitioner's motion (Journal of this Court, October Term 1948, p. 141 (February 7, 1949)); *Isbrandtsen Steamship Co. v. United States*, 81 F. Supp. 544 (S. D. N. Y.), appeal dismissed, April 4, 1949, *sub nom. Rederi v. Isbrandtsen Co., et al.*, No. 622, this Term. In the *U. S. Realty* case, a debtor corporation having liabilities in excess of \$3,000,000 and many public security holders, undertook to reorganize under Chapter XI of the Bankruptcy Act. The S. E. C. sought to intervene, alleging that Chapter X prescribed the exclusive procedure for the reorganization of corporations having securities in the hands of the public. After comparing the procedures prescribed by Chapters X and XI, this Court held that the safeguards provided for public security holders by Chapter X could not be circumvented by the debtor's resort to Chapter XI; in regard to the S. E. C.'s right to intervene, the Court stated (310 U. S. at 458-459):

The Commission is, as we have seen, charged with the performance of important public duties in every case brought under Chapter X, which will be thwarted, to the public injury, if a debtor may secure adjustment of his debts in a Chapter XI proceeding when, upon the applicable prin-

ciples which we have discussed, he should be required to proceed, if at all, under Chapter X. The Commission's duty and its interest extend not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interferences with their performance through improper resort to a Chapter XI proceeding in violation of the public policy of the Act which it is the duty of the court to safeguard by relegating respondent to a Chapter X proceeding. The Commission did not here intervene to perform the advisory functions required of it by Chapter X, but to object to an improper exercise of the court's jurisdiction which, if permitted to continue, contrary to the court's own equitable duty in the premises, would defeat the public interests which the Commission was designated to represent.

And in the *West India* case, the Court of Appeals for the Second Circuit ruled that the district court has general "power to issue an injunction in the aid of the [Maritime] Commission \* \* \* [to] \* \* \* preserv[e] the *status quo* until it could determine whether it had statutory jurisdiction, and, if so, how it should act." 170 F. 2d at 778-779.

This conclusion is sound since the normal powers of the courts are available in order that these agencies be able to function effectively in



carrying out Congressional policies. For, as this Court has often admonished, the federal courts are not to treat an administrative agency as an "alien intruder, to be tolerated if must be, but never to be encouraged or aided by the [courts] in the attainment of the common aim." *United States v. Morgan*, 307 U. S. 183, 191; *Hecht Co. v. Bowles*, 321 U. S. 321, 330. Courts and administrative agencies are "collaborative instrumentalities of justice" and "not business rivals." *United States v. Ruzicka*, 329 U. S. 287, 295. In *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 15, this Court, in dealing with a related question, sustained the implied and inherent power of reviewing courts to preserve the *status quo* in order "to save the public interest from injury or destruction" during the pendency of an appeal. This was stated to be in accord with "the purpose of Congress to utilize the courts as a means for vindicating the public interest." *United States v. Morgan*, 307 U. S. 183, 190-91; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes." Cf. *Addison v. Holly Hill Co.*, 322 U. S. 607, 620-622.

2. The district court improperly refused to exercise this power and to grant the assistance requested by the Commission. We have already

shown that the Commission does have control over dispositions of gas reserves, at least in some circumstances. See *supra*, pp. 21-53. Moreover, the proposed investigation might disclose, as the Commission alleged in its complaint (R. 8), that transfer of the reserves here involved without Commission approval might be inconsistent with the public interest, that such transfer constituted a violation of the Act, and might cause great and irreparable injury to the public served by Panhandle's system. To avoid these consequences, the district court should have granted the injunctive assistance requested. *Sanitary District v. United States*, 266 U. S. 405, 426; *In re Debs*, 158 U. S. 564, 591-592; *Robbins v. United States*, 284 Fed. 39, 46 (C. A. 8); see *Heckman v. United States*, 224 U. S. 413, 438, 442; *United States v. Rickert*, 188 U. S. 432, 444; *United States v. Bell Telephone Co.*, 128 U. S. 315, 367; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 285..

In addition, the fact that the Commission, a regulatory agency of the Government charged with protecting and acting in the public interest was the plaintiff seeking the injunctive aid of the court serves to emphasize the error below, for "since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Co.*, 328 U. S. 395, 398.

In these cases, "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief." *Hecht Co. v. Bowles*, 321 U. S. 321, 331; see, also, *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, 552; *Yakus v. United States*, 321 U. S. 414, 440-441 and cases cited.

By applying these principles, the Court of Appeals for the Second Circuit affirmed the granting of the requested injunction in circumstances very similar to those here presented. *West India Fruit & Steamship Co. v. Seatrain Lines, supra*. In that case, an injunction was similarly sought to maintain the *status quo* pending an investigation instituted by the Maritime Commission into whether certain reductions in rates proposed by Seatrain violated the Shipping Act of 1916, as amended. The Second Circuit, in affirming the granting of the injunction, held that the Commission should be permitted to "determine whether it had statutory jurisdiction and if so, how it should act." 170 F. 2d at 779. That court simultaneously refused to follow its earlier decision in *Securities and Exchange Commission v. Long Island Lighting Co.*, 148 F. 2d 252, and in addition distinguished it upon the ground that in that case the court "rested its conclusion on a holding that the SEC unmistakably lacked any possible jurisdiction; on the facts now before us, we are unable so to hold as to the Commission here." 170 F. 2d at 799. Since the Power Commission has jurisdic-

tion over the subject matter of its investigation, the principles embodied in the *West India* case also govern here: Cf. *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501.

C. TITLE TO THE HUGOTON STOCK HAS NOT PASSED TO PANHANDLE'S STOCKHOLDERS AND HENCE ENJOINING DELIVERY OF STOCK CERTIFICATES WOULD INFLICT NO HARDSHIP ON THEM

1. In the court below, intervener stockholders of Panhandle urged in effect that "The Panhandle-Hugoton transaction is a thing done and there is nothing a court can do to stop it" (R. 80). The court below, however, rejected that contention, pointing out "We do not think that the shareholders of Panhandle have fully completed rights to their stock dividends until they get the certificates [which] are now in the hands of the custodian \* \* \*" (R. 80).

This holding is, we submit, sound, for it is clear under the Uniform Stock Transfer Act—which the intervener stockholders urged in the court below is here controlling, a position with which we agree—that title to the stock may be transferred only by delivery of the certificate. This is clear from Section 1 of that Act which provides that "Title to a certificate and to the shares represented thereby can be transferred *only*, (a) By *delivery of the certificate* indorsed either in blank or to a specified person by the

person appearing by the certificate to be owner of the shares represented thereby, or (b) By *delivery of the certificate* and a separate document containing a written assignment \* \* \* .”

This already clear provision is explained by the Commissioners' Note thereto (6 Uniform Laws Ann., p. 2) as follows:

The provisions of this section are in accordance with the existing law (see Cook on Corporations, section 373 et seq.), except that the transfer of the certificate is here made to operate as a transfer of the shares, whereas at common law it is the registry on the books of the company which makes the complete transfer. The reason for the change is in order that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage. The transfer on the books of the corporation becomes thus like a record of a deed of real estate under a registry system.

Other provisions of the Act further demonstrate that shares are represented by the certificate and that title to the shares can be transferred only by delivery of the certificate. Thus, if a transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, Section 8 gives “an indefeasible right to the certificate and the shares



represented thereby" to a subsequent purchaser for value in good faith although the prior transfer has been rescinded or set aside. Section 13 provides that no attachment or levy upon shares for which a certificate is outstanding shall be valid until such certificate is actually seized by the proper officer, or is surrendered to the issuing corporation, or its transfer by the holder is enjoined. And Section 15 forbids any lien in favor of a corporation upon the shares issued by it or any restriction upon the transfer of shares by virtue of any bylaws of the corporation, or otherwise, unless such lien or restriction is stated upon the certificate.<sup>28</sup>

The Uniform Stock Transfer Act has been so construed by the New Jersey Court of Errors and Appeals, whose interpretation, we submit, governs here.<sup>29</sup> *Besson v. Stevens*, 94 N. J. Eq.

<sup>28</sup> The provisions of Section 3 are consistent with this view. Although under that Section the corporation is allowed to recognize as owner the person in whose name the stock is registered for the purpose of paying dividends, permitting him to vote, and to hold him liable for calls and assessments, these provisions are uniformly recognized to be primarily for the benefit of the corporation, so that it may act on the basis of the information in its stock books and be protected in such matters without liability to third parties. See Christy, *The Transfer of Stock* (2d ed. 1940), § 31; 12 Fletcher, *Cyc. of Corporations* (Rev. ed. 1932), § 5489.

<sup>29</sup> This Act is law both in Delaware, the domicile of Hugoton and Panhandle, and in New Jersey, the place of business of United States Corporation Company, Panhandle's agent for the transfer of the stock. Delaware Rev. Code 1935, §§ 2048 A-2048X; N. J. S. A. 14: 8-23 to 14: 8-46. Although

549; *Pattberg v. Gott*, 102 N. J. Eq. 371. See, also, *Figueres v. Sherrell*, 181 Tenn. 87; *In re Heller's Estate*, 210 Wis. 474. In holding that

Delaware's interest in the transfer of stock issued under its law is, of course, material, it would seem that the law of New Jersey, as the state where the certificate was at the time of the transaction, is controlling. See Restatement, *Conflict of Laws* (1934 ed.), § 53; Christy, *The Transfer of Stock* (2d ed. 1940), § 66; Hing, *Situs of Shares Issued Under the Uniform Stock Transfer Act*, 87 U. of Pa. L. Rev. 700. Even were Delaware law applicable, the interpretation of the New Jersey courts should be applied in the absence of any controlling Delaware decisions. This follows because the New Jersey courts are constraining a Uniform Act, which is also law in Delaware and furthermore because, apart from Delaware, New Jersey's concern with a stock transfer occurring within its own boundaries is clearly paramount to that of any other state. As far as we have been able to discover, there are no Delaware decisions on this question. *Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A. 2d 665 (Del. Ch.), and *Wilmington Trust Co. v. General Motors*, 51 A. 2d 584 (Del. Sup. Ct.), cited below by the stockholder interveners as holding that title may be transferred by transfer on the corporation stock records, do not involve the Uniform Stock Transfer Act. The *Trust Co.* case did not even involve any issue as to transfer of title; it dealt solely with the question whether the estate of a life beneficiary of a trust was entitled to receive a cash dividend paid after the beneficiary's death. The *General Motors* case did involve a problem of transfer of title to stock, but there the certificates involved were issued prior to the passage of the Act, which provides in Section 23 that it applies only to certificates issued after the effective date of the Act. The law then existing in Delaware provided that "the shares of stock in every corporation shall be deemed personal property and transferable on the books of the corporation in such manner and under such regulations as the By-laws provide \* \* \*". Rev. Code (1935) 2048. See 16.

<sup>30</sup> Although there are a number of cases involving the transfer of stock after the passage of the Uniform Act, very

the issuance of a new certificate in the name of the transferee without delivery thereof to him was not legally sufficient to pass title to him, the Court of Errors and Appeals stated (94 N. J. Eq. at 565):

Stock holding has a dual aspect. On the one hand, it involves a contractual relationship between corporate entity and the stockholder, and on the other, it involves the ownership of property—of an interest in the corporate property. Considering the contractual aspect, the dissolution of the contractual relationship between the corporation and the old stockholder is conditioned upon, and is incomplete until, the perfection or completion of the contractual relationship between the corporation and the new stockholder (the transferee), and that is not complete (at any rate, in a case where the transferee has not received from the transferor the assignment of the shares and himself presented it to the company)

few actually construe its provisions. For example, in *Buffaloe v. Barnes*, 226 N. C. 313, the court did not mention the Act. In *Peets v. Manhasset Civil Engineers*, 68 N. Y. S. (2d) 338, the court, in holding transfer on the books as sufficient, relied on decisions prior to the Uniform Act without independently examining the Act's effect. The statement in *Bayle v. First Nat. Bank*, 168 Misc. 398, contrary to the construction urged in the text, is *obiter*. For a collection of cases arising before and after the Act, see Notes, 99 A. L. R. 1077, 1085; 152 A. L. R. 427, 431, 435. It should be noted, however, that in most of the cases listed as arising after the Act, certificates issued prior to the Act are involved and the Act is not, therefore, in issue. See, e. g., *Shaw v. Addison*, 28 N. W. 2d 816 (Iowa), and *Simonton v. Dwyer*, 167 Ore. 50.

until the delivery of the new certificate and its acceptance by the transferee. No one can become a stockholder in a company without his knowledge and consent. \* \* \* Considering the matter from the property aspect \* \* \* the transaction is one solely between transferor and transferee. The corporation has no interest in the thing from this standpoint \* \* \*.

Since title to the Hugoton stock can be transferred only by delivery of the certificates to the Panhandle stockholders or to their agent in that behalf and no such delivery occurred, Panhandle's stockholders have not acquired legal title to the stock. Delivery by Panhandle of its block certificate to the United States Corporation Company, the transfer agent for Hugoton, was, of course, not delivery to the Panhandle stockholders or their agent. In receiving the certificate from Panhandle, the United States Corporation Company was acting simply as the agent of Panhandle to accomplish delivery to the transferees and not as agent for the stockholders. Panhandle, not its stockholders, control the Corporation Company's actions. Until the United States Corporation Company makes delivery to Panhandle's stockholders, Panhandle can obtain the certificate back or retransfer it without the consent of its stockholders. See *Southern Industrial Inst. v. Marsh*, 15 F. 2d 347, 349 (C. A. 5), certiorari denied, 273 U. S. 747; *Besson v. Stevens*, 94 N. J. Eq. 549, 566.

The very facts of this situation gainsay the contention of the stockholder interveners that title of the stock has already passed to them. Both the temporary restraining order (R. 23) and the interlocutory stay (R. 81) enjoin only Panhandle and its agents from transferring title to third persons; neither order restrains Panhandle's stockholders from selling the Hugoton stock. Yet notwithstanding the absence of restraint, Panhandle's stockholders have not attempted to transfer title. Instead, some have entered into contracts to sell "when, as and if delivered." However, if, as they contend, title to the shares has been transferred to them by changing the registration of holders in the Hugoton stock records, and if the United States Corporation Company is the agent of the transferee rather than the transferor, they may use the same machinery to transfer title to third parties, without the certificates of stock. The fact that the stockholders have not attempted such transfers illustrates, their contention notwithstanding, that United States Corporation Company is Panhandle's agent in this transaction and that certificates of stock are essential to the transfer of title. Absent the certificate, there has been no transfer of title.

2. The intervener stockholders further urged that they have at least equitable rights to the stock which, they contended, warrant the denial to the Commission of injunctive assistance. But the rights which they assert to the stock have not



accrued to them as the result of a purchase for value in good faith; they have paid nothing for the Hugoton stock. Their position here, as intended recipients of a dividend which Panhandle was not obligated to declare, is somewhat analogous to that of a donee. An injunction would not, and has not, prevented them from selling Hugoton shares over-the-counter on a "when, as, and if" basis.<sup>31</sup> Over-the-counter transactions do not, as interveners assert, prevent them from realizing cash for the Hugoton shares nor do they create an indefinite risk of the solvency of the purchaser. Risk of insolvency may be guarded against by "marking to the market," i. e., by requiring the buyer to deposit any amount by which the open market price of the "when, as, and if" stock falls below the price which he has contracted to pay. Alternatively, interveners could obtain cash by assigning their over-the-counter contracts. See Loss and Vernon, *When-Issued Securities Trading in Law and Practice*, 54 Yale L. J. 741, 752, 761-762.<sup>32</sup>

<sup>31</sup> We have been informally advised that notwithstanding the interlocutory restraint imposed by the court below, the active over-the-counter trading of the Hugoton stock on a "when, as, and if" basis has continued.

<sup>32</sup> The suggestion of the stockholder on behalf of the over-the-counter purchasers that the effect of restraining the delivery of the Hugoton stock would cause hardship to the purchasers also is likewise without merit. The very words "when, as, and if" evidence the fact that participants in such transactions fully realize their contingent nature. Although the over-the-counter sales here involved were "when, as, and if

= In these circumstances, any equitable rights of the stockholder interveners are far outweighed by the countervailing public interest here in maintaining the *status quo* pending the outcome of the Commission's investigation (*supra* pp. 66-68). Moreover, the Commission's investigation may reveal that the Panhandle-Hugoton transaction is illegal. If so, the declaration by Panhandle of the Hugoton stock as a dividend to its stockholders also would be illegal. To undo the transaction after such determination by the Commission, if no injunction is here granted, would result in far greater hardships to the stockholders and those who purchased the stock from them.<sup>33</sup> In any case it should be remembered

delivered" they are in many respects similar to "when, as, and if issued." The possible frustration of either type of transaction is by definition an inherent element in each. See *In re Civic*, 34 F. 2d 624, 626 (C. A. 2); *Zimmermann v. Timmermann*, 193 N. Y. 486, 493-494; *Sices v. Ungerteider*, 142 Misc. 402; *Loss and Vernon*, *supra*, at 746, 751, 763-766. In addition, the fact that not one of these purchasers has sought to intervene in this proceeding illustrates their recognition that they were without any claim, equitable or otherwise.

<sup>33</sup> The court, we believe, could in those circumstances require that the transaction be undone. The change in legal ownership of the stock would not be irrevocable and would not bar cancellation of the transfer of the gas reserves. As already noted, courts of equity may go much further to give relief in furtherance of the public interest than they are accustomed to go when private interests are involved. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U. S. 321, 329. In *Continental Insurance Co. v. United States*, 259 U. S. 156, 170-173, this Court declared that the district court, in

that any hardships suffered by Panhandle's stockholders are the consequence of Panhandle's private determination of law after due notice of the Commission's order of October 26, 1948, lawfully instituting an investigation of the facts and circumstances involved in the formation and proposed operation of Hugoton (R. 10). The order of October 26, 1948, served upon Panhandle prior to its delivery of the block certificate of Hugoton shares to the transfer agent, put it on notice that it should not proceed any further to consummate the transaction. Panhandle, however, chose to disregard this notice and proceeded at its own risk to deliver the stock certificate to its transfer agent on October 29. Since it is this delivery which lies at the basis of the stockholders' claims, neither Panhandle, nor its stockholders, are in a position now to urge in opposition to the enforcement of the Commission's orders the matters arising out of this delivery. Cf. *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 15; *United States v. United Mine Workers*, 330 U. S. 258, 292; *Porter v. Lee*, 328 U. S. 246; *Porter v. Dicken*, 328 U. S. 252.

directing the dissolution of the Reading Company as a combination in restraint of trade, could disregard the legal effect of a general mortgage although the bondholders were allegedly innocent of any wrongdoing and were not identified with the management of the Reading Company.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed, with directions that the injunctive assistance requested by the Commission be granted so that the Commission may proceed with its investigation into whether the Panhandle-Hugoton transaction violated the Natural Gas Act, or any Commission order thereunder.

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CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948

No. 558

FEDERAL POWER COMMISSION,

*Petitioner,*

PANHANDLE EASTERN PIPE LINE COMPANY, et al.,

*Respondents.*

**BRIEF OF RESPONDENT PANHANDLE EASTERN  
PIPE LINE COMPANY IN OPPOSITION TO  
PETITION FOR CERTIORARI.**

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IN THE  
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OCTOBER TERM, 1948

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FEDERAL POWER COMMISSION

*Petitioner,*

PANHANDLE EASTERN PIPE LINE COMPANY, *et al*,

*Respondents.*

---

**BRIEF OF RESPONDENT PANHANDLE EASTERN  
PIPE LINE COMPANY IN OPPOSITION TO  
PETITION FOR CERTIORARI.**

**Opinions Below.**

The findings of fact and conclusions of law of the District Court appear in the Record (R. 60-66). The opinion of the Court of Appeals for the Third Circuit, written by Judge Goodrich and not yet officially reported, appears in the Record (R. 74-81).

**Counter-Statement of Facts.**

The Panhandle company is engaged in transporting and selling natural gas in interstate commerce. It is also engaged in producing natural gas.

The Natural Gas Act of 1938 grants regulatory authority to the Federal Power Commission over transportation of natural gas in interstate commerce and over sale of

natural gas in interstate commerce for resale to the public. At the same time the Act, by section 1(b), declares that its provisions

"shall not apply . . . to the production or gathering of natural gas".

Panhandle, having plenty of gas in the ground,—more gas in the ground than pipe line capacity to transport such gas (R. 46),—transferred gas production leases on 97,000 acres in Kansas to Hugoton Production Company (a company it had caused to be organized), in exchange for the entire capital stock of the Hugoton company. Panhandle at the same time declared the entire issue of Hugoton stock as a dividend to its own stockholders, one share of Hugoton to every two-share holding of Panhandle stock. This transaction took place on October 11, 1948, and the Federal Power Commission was informally advised of it by Panhandle.

The gas production leases so transferred came to less than 5 percent of the total gas under control of Panhandle. The transaction made no substantial impairment in the ability of Panhandle to produce, transport and sell natural gas in interstate commerce. Moreover, the diminution, slight as it was, was offset by the development of marginal leases and unproven leases. (R. 27-28.)

The Hugoton company a few days later made a contract to sell the gas produced from the transferred gas leases to the Kansas Power and Light Company, for sale and consumption within Kansas. The transaction had the support of the Kansas Corporation Commission, the public regulatory agency of Kansas.

The dividend in Hugoton stock was payable to stockholders of record on October 29, 1948 and was to be distributed on November 17, 1948.

The Commission, under date of November 10, 1948, issued an order to Panhandle and Hugoton, directing them to show cause why the transfer of the gas leases by Panhandle should not be set aside.\*

The Commission then brought the present suit in the District Court, asking for injunction and also preliminary injunction against distribution of the Hugoton stock certificates. At that time everything in the way of distribution except the final act of mailing the stock certificates had been done. The District Court, after hearing, denied preliminary injunction. The Commission appealed to the Court of Appeals for the Third Circuit. That court affirmed the order of the District Court. Successive restraining orders, however, have prevented distribution of the stock certificates.

### Ground of Decisions Below.

The ground of decision taken by the District Court and by the Court of Appeals was that the transaction attacked by the Commission had to do primarily with production of natural gas; that the Natural Gas Act by explicit provision excluded "production and gathering of natural gas" from the Commission's jurisdiction; and that the incidents relied on by the Commission as bringing the case within the scope of its authority did not carry significance.

Both courts also pointed out that it has been the practice in the industry to trade freely in gas leases, and that the Commission has never heretofore asserted the right to

\* The Commission had already, on October 26, 1948, issued an order instituting an investigation of the transaction. That order was not an assertion of regulatory power, since by virtue of Section 14(a) of the Natural Gas Act the Commission's investigatory powers go beyond its regulatory powers. Panhandle does not oppose the investigation.



regulate transfers of such leases. The Court of Appeals also referred to the Commission's regulations, it being stated in the regulations that the Natural Gas Act did not give the Commission regulatory power over production of natural gas.

### **Reasons for Denying the Writ.**

The petition does not show any special or important reasons for granting the writ.

The decision of the Court of Appeals for the Third Circuit is not in conflict with any decision in another circuit.

The case does not present an important question of federal law that should be settled by the Supreme Court.

There is no claim that the decision constitutes such a departure from the accepted and usual course of judicial proceedings as to call for exercise of the power of supervision.

We submit, on the contrary, that the decision below was in conformity to the Natural Gas Act and was correct. Every point relied on by the petitioner here was given thorough consideration in the opinion written by Judge Goodrich.

### **I.**

**The Natural Gas Act in plain language excludes transfers of gas production leases from the jurisdiction of the Commission.**

1. Section 1(b) of the Act provides:

"The provisions of this act \* \* \* shall not apply \* \* \* to the production or gathering of natural gas".

The plan of regulation designed by Congress does not embrace control of production of natural gas by the Com-

mission, that activity having deliberately been left to control by state commissions.

*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 612;  
*Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 602;  
*Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 690;  
*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 516.

2. The unmistakable meaning of section 1(b) of the Act has been recognized by the Commission itself. Although the Commission has had a set of rules for ten years, the rules have never suggested that dealings in gas leases should be submitted to the Commission for approval. On the contrary, the Commission's "General Rules and Regulations" provide:

"The Federal Power Commission is of the opinion that it was the intent of the Congress that the control of production or gathering of natural gas should remain a function of the States and that the Natural Gas Act should not provide for regulation of those subjects" (18 Code Fed. Regs., Ch. I, Sec. 03.79).

This sentence from the Commission's own rules is an open acknowledgment that the Natural Gas Act gives it no control over production activities and no standing to bring this suit.

3. It is also significant that the present attempt to assert jurisdiction over dealings in gas leases is unique in the history of the Commission,—this despite the fact that it has always been common practice in the natural gas in-

dustry to deal freely in gas leases. Until this suit was commenced the Commission never intimated that it had the right to regulate transfers of gas leases.

See

*Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351.

## II.

**The fact that some of the gas leases had been included in the rate base for purposes of rate making does not furnish a shadow of jurisdiction for the regulation of gas leases.**

The Commission was well aware of the barrier erected by section 1(b) of the Natural Gas Act. In an effort to climb over that barrier it alleged in its complaint that certain of the gas leases involved in the transfer had been included by Panhandle in its rate base; also that Panhandle in applying for certificates of public convenience and necessity for construction of additional pipe line facilities had mentioned some of the gas leases as being part of its gas reserves and so might have "dedicated" such gas production leases to the service of its transportation facilities.

The amounts involved were trifling.

Aside from that fact, the Commission's argument proves too much, as the Court of Appeals pointed out. If it were sound, the Commission could move in on a broad front and assert regulatory power over all production facilities of virtually all natural gas companies,—to the utter disruption of regulation by the states over such production.

This court, in the *Colorado Interstate* case, *supra* (324 U. S. 581), pointed out that inclusion of production properties for rate making on insistence by the Commission does

not mean that the Commission has regulatory power over production properties of a natural gas company. After holding that for rate making purposes the Commission might include gas production facilities in the rate base, — this by reason of sections of the Act dealing specifically with rate making, — the Court went on to say:

“That does not mean that the part of Section 1(b) which provides that the Act shall not apply ‘to the production or gathering of natural gas’ is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas” (pages 602-603).

This should dispose of the faint-hearted suggestion that the inclusion of some of these gas producing properties in the rate base of Panhandle, or possibly the mention of them in proceedings for certificates of public convenience and necessity on pipe line facilities, equipped the Commission with a regulatory power denied it by the Natural Gas Act.

### III.

**The complaint did not show any basis for issuance of an injunction.**

The courts below were right in holding that the Commission made no case for injunctive relief.

1. Under section 20(a) of the Natural Gas Act, the Commission may apply to a district court for an injunction against acts or practices

“which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation or order thereunder.”

The petition for certiorari makes no claim that the respondent has committed any act or practice in violation of any provision of the Natural Gas Act or of any rule, regulation or order. The petition makes no claim that the case was one for an injunction under section 20(a) of the Act.

2. The petitioner relies on the line of cases to the effect that courts will give injunctive relief to assist an administrative agency in exercise of its jurisdiction. These cases are not applicable where, as here, the organic statute by specific provision defines the situations in which the administrative agency has the right to go to the courts for injunctive relief.

Apart from that point, the "assistance" doctrine has no application. Under that doctrine probable jurisdiction in the administrative agency must be made to appear. In the present case probable jurisdiction in the Federal Power Commission was lacking.

3. The petitioner, as a final argument, refers to the cases on the "primary jurisdiction" rule, such as *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, and *Macauley v. Waterman Steamship Corporation*, 327 U. S. 540. The "primary jurisdiction" principle has nothing to do with a case where jurisdiction in an administrative agency is visibly lacking and where litigation in the courts is commenced, not by the private party, but by the administrative agency. This aspect of the case was thoroughly discussed by the Court of Appeals.

The petition for certiorari is in error in stating that the courts below refused "to permit the Commission in the first instance to determine its statutory jurisdiction".



There was no such refusal. As the Court of Appeals said (R. 78):

"But in this case no court is stepping between the Commission and the performance of its job. The Commission is, on the other hand, seeking court help, which it admits is discretionary, in a situation where its investigatory powers have been unopposed. When a party plaintiff seeks court help, it must show that it is entitled to such help. In determining whether a plaintiff is entitled to the relief asked, the court cannot escape the responsibility of deciding whether plaintiff has been given rights or powers for which court sanction is now sought."

### Conclusion.

The points involved are well settled and require no consideration by the Supreme Court. There is no conflict in the circuits on any of the matters pressed by the petitioner.

The petition for certiorari should be denied.

Respectfully submitted,

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CHARLES ELMORE WATLEY

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# In the Supreme Court of the United States.

OCTOBER TERM, 1948

FEDERAL POWER COMMISSION, *Petitioner,*  
*vs.*

PANHANDLE EASTERN PIPE LINE COMPANY,  
*et al.*

**BRIEF OF RESPONDENT STATE CORPORATION COM-  
MISSION OF THE STATE OF KANSAS IN  
OPPOSITION TO THE PETITION FOR  
WRIT OF CERTIORARI**

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# In the Supreme Court of the United States

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FEDERAL POWER COMMISSION, *Petitioner,*

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**BRIEF OF RESPONDENT STATE CORPORATION COM-  
MISSION OF THE STATE OF KANSAS IN  
OPPOSITION TO THE PETITION FOR  
WRIT OF CERTIORARI**

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## OPINIONS BELOW

The finding of fact, conclusions of law and opinion of the United States District Court for the District of Delaware appear in the record (R. 49-50, 60-66). The opinion of the United States Court of Appeals for the Third Circuit, not yet officially reported, appears in the record (R. 74-81).

## SUPPLEMENTAL STATEMENT OF FACTS

Pertinent characteristics of the Panhandle Company and its operations are adequately described in the Petition of the Power Commission (Petition, p. 4) and in the Brief of Panhandle (Panhandle Brief, pp. 1-2) as are the transactions giving rise to the unsuccessful injunction proceedings in the courts below. (Petition, pp. 6-7, and Panhandle Brief, pp. 2-3.)

The Corporation Commission of Kansas exercises jurisdiction over the production and marketing of natural gas and regulates the rates and services of public utilities operating within the State of Kansas (R. 70-74). It has no more than an observer's interest in the stock transfers and financial transactions which are so engrossing to the two principals in this litigation. It is deeply concerned with the jurisdictional questions relating to the transfer by Panhandle to Hugoton of gas and gas-and-oil leases covering acreage in the Kansas Hugoton Field. Aside from its desire to exercise fully its statutory jurisdiction free from dependence on the Power Commission's consent, the Corporation Commission is interested in the supply of natural gas Hugoton will make available to a Kansas utility serving 52,500 Kansas gas users (R. 71). This latter interest quite possibly has emphasized the jurisdictional quarrel (R. 72-73).



The leases transferred by Panhandle to Hugoton cover undeveloped acreage (R. 25 and 31) within the Kansas Hugoton Field. That is, there are no wells on and there is no present production from the leases involved. The Corporation Commission has encouraged the free trading of leases and production rights in the Hugoton Field to facilitate prevention of waste, protection of correlative rights and to secure orderly development in and of this common source of supply (R. 72). These are its duties under the applicable Kansas statutes. (G. S. of Kansas 1947 Supp., 55-701 to 55-713, pertinent portions of which are set forth in an appendix beginning on page 12.)

These proceedings mark the first attempt by the Federal Power Commission to exercise regulatory jurisdiction over the transfer of gas leases (R. 47) and it claims its approval of the transfer should have been sought by reason of implied obligations arising under the certificate sections of the Natural Gas Act (R. 46).

#### **REASONS FOR DENYING THE WRIT**

The decision of the Court of Appeals below is clearly and correctly in accord with the decisions of this court dealing with the Natural Gas Act and there is no conflict among Circuit Courts of Appeals as to the questions here presented.

## ARGUMENT

The Natural Gas Act does not confer upon the Federal Power Commission jurisdiction over the acquisition and transfer of gas leases.

Authority of the various states to regulate "production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern" was recognized and respected by Congress in its enactment of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. A. 717-717W; *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682 1. c. 690. Accordingly, the broad grant of jurisdiction was made inapplicable by Section 1 (b) to "production or gathering of natural gas." This court has held the activity of producing or gathering natural gas beyond the regulatory reach of the Power Commission and subject to regulation only by the states. *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581 1. c. 597; *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682 1. c. 689.

The question is whether the transfer of gas leases by a natural gas company is subject to regulation under the act or is an activity of "production or gathering" specifically excluded from its application. The courts below determined such transfers were excluded. We think those determinations clearly correct.

The Act applies to the transportation and to the sale of natural gas in interstate commerce and to natural gas companies engaged in such transportation or sale. Transfer of an undeveloped gas lease is neither transportation nor sale in interstate commerce of natural gas. The Power Commission asserts that a natural gas company certificated under the Act has an implied obligation to secure Commission approval before effecting a transfer of its leased reserves. From the argument of its counsel, we take it that the Commission's view is this implied obligation holds regardless of the extent of the transfer (R. 46-48 inc.). Gas leases have been freely sold and exchanged in the industry for many years. Undoubtedly, this practice was known to the legislative architects designing the law. It is admitted by the Power Commission it always has known. No reference, beyond the exclusion in Section 1 (b), to this practice is found in the Act and no rule or regulation of the Power Commission makes mention of gas reserve transfers or of the alleged obligation it now attempts to enforce. If the obligation is implied, so must be the Commission's power to enforce it and surely no power in the Commission can be implied which reaches beyond the Act's defined applicability.

If the transfer of gas leases is an activity of production

or gathering, it is not regulable as such by the Power Commission even if accomplished by a natural gas company subject to the act.

Production of gas is the ultimate objective to be attained in securing a gas lease. The activity of securing and exchanging leases relates only to production and to no other phase of a natural gas company's operations. This activity and its objective, production, is completed before the incidents of Power Commission jurisdiction attach. It is an integral part of production and falls within the field of regulation left to the states.

The Corporation Commission of Kansas is exercising jurisdiction over production of natural gas in the Hugoton Field. It seeks to prevent waste, protect correlative rights and secure the orderly development in and of the Hugoton Field. It encourages the free exchange of leases because it has found that facilitates orderly development and the accomplishment of the other statutory goals. (See G. S. 1947 Sup., 55-703 in the appendix at page 12.) The Corporation Commission feels the Power Commission's assertion of jurisdiction over transfers of leased reserves is an unwarranted interference with the full and free exercise of this state's authority.

That Congress intended no conflict between Federal and state authority to arise from the Natural Gas Act is clear in the decisions of this court.

*Public Utilities Co. v. United Fuel Gas Co.*, 317 U. S. 456, 87 L. Ed. 396.

*Illinois Nat. Gas Co. v. Central Ill. Pub. Serv. Co.*, 314 U. S. 498, 86 L. Ed. 371.

*Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591, 88 L. Ed. 333.

*Colorado Interstate Gas Co. v. Federal Power Comm.*, 324 U. S. 581, 89 L. Ed. 1206.

*Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, 91 L. Ed. 1742.

*Panhandle Eastern Pipe Line Co. v. Public Service Comm.*, 332 U. S. 507, 92 L. Ed. 173.

In the *Panhandle* case last cited, this court said:

"The declaration, though not identical in terms with the one made by the McCarran Act concerning continued state regulation of the insurance business, is in effect equally clear, in view of the Act's historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over." 332 U. S. 507 l. c. 521.

The implication forced by the Power Commission from an unwilling Act should not be permitted, in the face of the decisions cited and the above quotation, to promote a conflict between state and Federal authority which the Congress meticulously sought to avoid.



The Courts below were correct in refusing the injunction applied for.

Section 20 (a) of the Natural Gas Act reads in part as follows:

"Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or if any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States to enjoin such acts or practices."

Our view is that the transfer of gas leases here involved is beyond the applicability of the Natural Gas Act and so beyond the Power Commission's jurisdiction. It cannot be an act or practice which constitutes or will constitute a violation of the Act or of any rule, regulation or order thereunder.

Following our argument concerning jurisdiction *supra*, we disagree with the Power Commission's assertion that "there is at least a reasonable basis for Commission control over a natural gas company's disposition of its gas reserves." (Petition, p. 16.) Therefore, if the court had limited its inquiry, as the Power Commission suggests it should have, into whether there was any reasonable basis for Commission jurisdiction (Petition, p. 16) denial of the injunction would have been the correct disposition of the case.

## CONCLUSION

The decisions below were grounded on well settled principles and are clearly correct. There is no conflict among the Circuit Courts of Appeals on any of the questions involved in this case.

The petition of the Federal Power Commission for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

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## APPENDIX

The pertinent Kansas Statutes (citations to G. S. 1947 Supp.) read in part as follows:

"55-703. *Production regulations, rules and formulas.* That whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste. . . . The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. . . ."

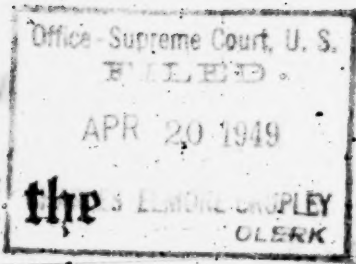
"55-703a. *Well spacing and orderly development.* The drilling and completion of a gas well shall not of itself entitle said well to an allowable for production; and the commission may, in its

discretion, provide for well spacing in any such common source of supply and provide for the orderly development thereof."

"55-704. *Rules and regulations authorized; notice and hearings.* The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act, . . . and as the commission may find necessary and proper to carry out the spirit and purpose of this act: . . . ."

"55-705a. *Certificate required; notice and hearing.* Before any gas shall be produced from a well producing gas only, or from a well which is primarily a gas well, for any of the purposes specified in section 2 (55-702) of this act, a certificate shall be obtained from the commission for the construction of the facilities necessary or required and/or the utilization of the gas in the manner and for the purposes intended; . . . ."





**Supreme Court of the  
United States**

OCTOBER TERM, 1948.

558

**No. 558.**

FEDERAL POWER COMMISSION, PETITIONER,  
VS.  
PANHANDLE EASTERN PIPE LINE COMPANY  
ET AL.

**BRIEF OF RESPONDENT STATE CORPORATION  
COMMISSION OF THE STATE OF KANSAS.**

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# Supreme Court of the United States

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FEDERAL POWER COMMISSION, PETITIONER,

VS.

PANHANDLE EASTERN PIPE LINE COMPANY  
ET AL.

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BRIEF OF RESPONDENT STATE CORPORATION  
COMMISSION OF THE STATE OF KANSAS.

---

## OPINIONS BELOW.

The findings of fact, conclusions of law and opinion of the United States District Court for the District of Delaware appear in the record (R. 49-50, 60-66). The opinion of the United States Court of Appeals for the Third Circuit is found in the record (R. 74-81) and is reported at 172 F. 2d 57.

## STATUTES INVOLVED.

We note in the Power Commission's Brief that this Court is being furnished pamphlet copies of the Natural Gas Act. We have, therefore, omitted any portion of the Act from the Appendix to this Brief. We have set forth in the Appendix pertinent portions of Chapter 55, Section 7 of the 1947 Supplement to the General Statutes of Kansas, 1935, to which we refer.

## SUPPLEMENTAL STATEMENT.

In this Brief, Panhandle Eastern Pipe Line Company will be referred to as Panhandle, Hugoton Production Company as Hugoton, The Federal Power Commission as the Power Commission and the State Corporation Commission of Kansas as the Corporation Commission.

Most of the facts pertinent to this appeal are set out in the "Statement" in the Power Commission's Brief. The Corporation Commission was permitted to intervene in this matter at the Court of Appeals level (R. 74).

The Corporation Commission is empowered and obligated to regulate the production and conservation of natural gas within the State of Kansas (Chapter 55, Article 7, 1947 Supp. to the General Statutes of 1935, Appendix, pp. 17, 18).

Under the authority so conferred, the Corporation Commission has and exercises jurisdiction over the Kansas Hugoton Gas Field. It has issued a Basic Proration Order and each month it issues a monthly proration order regulating the taking of gas from the Field. By so doing it accomplishes the prevention of waste, the protection of correlative rights and the orderly development in and of that common source of supply.

The Corporation Commission is empowered to promulgate such rules and regulations as may be necessary and proper to carry out the spirit and purpose of the statutes. (55-704, Appendix, p. 18).

Panhandle produces and purchases natural gas in the Kansas Hugoton Field and its activities there are supervised and regulated by the Corporation Commission. Q

Several large purchasers of natural gas, among them Panhandle, have sought to obtain large gas reserves within the Hugoton Field by securing gas leases from individual landowners or assignments of leases from individual lessees. Often the reserves secured by a particular purchaser are not advantageously located with respect to the purchaser's transportation facilities, but are near the transportation facilities of another purchaser. Free sale and exchange of leases and production rights among the various purchasers enables them to "block," or consolidate, their respective production acreage near to or around their pipe-line transportation facilities. This practice or activity has been encouraged by the Corporation Commission because it facilitates the operation of the conservation program formulated by the Corporation Commission. It helps to prevent formation of undeveloped islands of productive acreage which is exceedingly important to the Corporation Commission in the discharge of its statutory duty to secure orderly development of the Kansas Hugoton Field (R. 70-74).

The Power Commission asserts that a natural-gas company is obligated to secure the approval of the Power Commission before the company may transfer its reserves. In his argument (R. 46-48), counsel for the Power Commission expresses the view that this obligation holds, regardless of the extent of the intended transfer.



We think such a view translated into Power Commission action, will leave the success of the Corporation Commission's efforts to secure orderly development dependent to an unwarranted degree upon the consent of the Power Commission.

### QUESTIONS PRESENTED.

1. Has Congress, in the Natural Gas Act, granted to the Federal Power Commission any jurisdiction or control over the transfer by a natural-gas company of undeveloped gas leases?
2. Did the courts below properly refuse the injunction sought by the Federal Power Commission?

5

## ARGUMENT.

### I.

#### **The Primary Grant of Power in the Natural Gas Act Does Not Give the Power Commission Jurisdiction Over Transfers of Undeveloped Gas Leases.**

The Natural Gas Act (52 Stat. 821, 15 U. S. C. 717-717w) is, at once, Congress' full expression of Federal authority over certain phases of the natural gas industry and the Power Commission's measured mandate to exercise it.

Provisions of the Act (Section 1 (b)) apply to:

- (1) the transportation of natural gas in interstate commerce,
- (2) the sale in interstate commerce of natural gas for resale, and
- (3) natural-gas companies engaged in such transportation or sale.

The Act specifically exempts from the effect of its provisions important activities pertinent to this case to which we will refer later. Presently, we consider only whether the language setting forth the activities to which the Act does apply, in any event, describes or includes the transfers of gas leases on undeveloped acreage. Certainly such transfers are neither "transportation of natural gas in interstate commerce" nor sales "in interstate commerce of natural gas for resale." Does the Act's applicability to "natural-gas companies engaged in such transportation or sale" give the Power Commission jurisdiction over transfers, by a natural gas company, of leased gas reserves?

The act makes no mention of gas reserve transfers and no rule or regulation promulgated by the Power Commission touches this subject.

We will consider now the portions of the Act on which the Power Commission relies as giving it the authority it seeks here to exercise.

#### A.

##### **Certificate Section Does Not Authorize Control over Reserves.**

Section 7 (c) requires the securing of a certificate of convenience and necessity by a natural-gas company, or person which will be a natural-gas company, before it may engage in a transportation or sale of natural gas subject to the jurisdiction of the Power Commission. Section 7 (d) and (e) sets forth how applications shall be made and what must be established to the satisfaction of the Power Commission before a certificate may be granted. The latter paragraph also empowers the Commission to attach to the issuance of a certificate such reasonable terms and conditions as the public convenience and necessity may require.

To obtain a certificate to construct and operate facilities under the jurisdiction of the Power Commission, an applicant must establish its ability to serve. Ability to serve necessarily includes access to adequate reserves. The Power Commission asserts that Panhandle was granted certain certificates on its representations to the Power Commission that, among other things, it had adequate reserves available and the Power Commission contends that those reserves have been thereby dedicated to the public. It says there was an obligation on the part of Panhandle to seek the Power Commission's approval of the transfer. But the Commission's authority under Section 7(c) (d) and (e) extends to granting or refusing a certificate. In exer-

cising that authority, it is concerned with the original determination of gas reserve adequacy only.

We know of no established formula or guide applied by the Power Commission to determine adequacy of reserves. A figure representing "adequate" reserves would, it seems, be a variable, requiring adjustment to changing market demands and transmission capacities. It would not be the same for every company, and for each company it would vary from time to time. The Power Commission does not pretend to compare currently a natural-gas company's reserves to its market demands and require appropriate reductions or additions of productive acreage. The Power Commission has never asserted its approval should be obtained before leases are acquired and not until now that it has power to control transfers. To date, the activity of acquiring or transferring gas leases has been freely and appropriately left to the management of the company, which has a dual obligation to protect the consuming public and the investment in pipe-line facilities. Had the Power Commission in the certificate proceedings determined that maintenance of specific acres of reserves were necessary in the public interest, it could have at least attempted under Section 7 (e) to condition the granting of the certificate on such reserves being maintained.

The Power Commission has full record knowledge of Panhandle's gas reserves and at no point in this proceeding has it contended that the transfer here questioned has rendered those reserves inadequate.

## B.

### **Disposition of Reserves Is Not Abandonment of Facilities or Service.**

In its Brief, the Power Commission relies on Section 7 (b) of the Act as providing it with clear authority over

a natural-gas company's disposition of its leased reserves. That subsection reads as follows:

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

That reserves are not "facilities subject to the jurisdiction of the Commission" is clear from a reading of the quoted subsection. One of the grounds for abandoning "facilities" or "service rendered by means of such facilities" is inadequacy of reserves. The other ground is that the public convenience and necessity permit such abandonment. Obviously, "facilities" here means the pipe, compressors, meters, etc., between the reserves and the public by means of which the supply of gas is transported and delivered to the public. This is indicated in the argument of counsel for the Power Commission before the District Court below (R. 46).

The Power Commission argues, however, that a gas company may, by disposing of its reserves, disable itself from rendering continued service and thereby effect an abandonment of facilities or service without the Power Commission's approval. If this argument is valid as to reserves, we suppose it might be validly applied if the company decided to discharge some of its employees engaged in operating the facilities and the Power Commission asserted its approval should be first obtained. The argument rests on the fallacious assumption that there



can be no other reserves available to Panhandle if and when it requires additional gas.

In either case, the argument completely overlooks the company's interest in continuing service and the authority of the Power Commission to require continued service. It is no more than an attempt to justify invasion into a field reserved to management and state regulation.

We reiterate that the Power Commission, with full knowledge of Panhandle's system and the extent of its reserves, has not asserted that the transfers here involved will result in or effect the abandonment of any of Panhandle's facilities or service.

### C.

#### **Particular Reserves Not Dedicated.**

The Power Commission declares control over disposition of reserves is necessary to prevent a natural-gas company from "repudiating the dedication of such gas reserves to the discharge of its obligations as a public utility." Particular reserves are not essential to continued utility operation. Only the extent of available reserves is important. No doubt, Congress' realization of this basic fact led to empowering the Commission (Section 14 (b)) to determine the adequacy of gas reserves held by a natural-gas company. The facts which would be developed in such an investigation of Panhandle (with the possible exception of after acquired leases) have been made known to the Power Commission in FPC Dockets G-706 and G-876 (R. 12-14). Also, the investigating power so conferred has been described as an aid to the Commission in the performance of its rate-making functions, *Colorado Interstate Gas Co. v. Federal Power Comm.*, 324 U. S. 581, 602.

It is the position of the Corporation Commission that the dedication is not of particular reserves, but of adequate

reserves, and that a natural-gas company is free to acquire, transfer and exchange reserves subject to legitimate control by the appropriate state agency. Further, that there can be no dedication even of adequate reserves in the Kansas Hugoton Field which transcends the powers of the State of Kansas to limit, stay or divert to other uses the production from that field if the Corporation Commission finds it necessary to do so in the interests of conservation, protection of correlative rights or orderly development in and of the field, *Colorado Interstate case, supra, Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 690:

#### D.

##### **Control of Lease Transfers Not Essential to Rate Making.**

Control by the Power Commission over disposition of gas reserves by a natural-gas company is not essential to protect the Power Commission's "rate making function."

The Power Commission's argument on this point (P. C. Brief, I. B. 2(a))<sup>1</sup> is that Panhandle is going to make some unregulated profits on the sale of some of its gas reserves and that this will increase the rates to ultimate consumers. It is not specified whether Panhandle's consumers are meant. It is difficult to see how the transaction here involved will result in increased rates to Panhandle's customers. The increase in book value of the reserves will not affect Panhandle's rate base. This new value will appear on Hugoton's books. Hugoton will sell to Kansas Power and Light Company. If the Power Commission is concerned about the customers of Kansas Power and Light

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<sup>1</sup>Reference to letter designation of topics and subtopics necessary as printed copies of Power Commission's Brief unavailable at this writing.

Company, it wastes its tears. The Corporation Commission in the exercise of its utility regulatory jurisdiction will take care of that matter. Also, the Power Commission need not worry about the price at which Panhandle may purchase from Hugoton fifteen years from now. The broad rate-making powers in the Power Commission confirmed in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, and *Colorado Interstate* case, *supra*, are surely sufficient to solve that affiliate problem for the benefit of the ratepayers. The exercise of these same broad powers after the investigation now pending before the Power Commission, FPC Docket G-1147, will serve to correct any unreasonableness or injustice which may appear in Panhandle's rate structure as a result of the transfer of leases.

In *Panhandle Eastern Pipe Line Co. v. Public Service Comm.*, 332 U. S. 507, 521, this Court said:

\* \* \* \* The declaration, though not identical in terms with the one made by the McCarran Act \* \* \* concerning continued state regulation of the insurance business, is in effect equally clear, in view of the Act's historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over

\* \* \* "

We submit that nothing in the primary grant of power contained in the Natural Gas Act is an express taking over of regulation of undeveloped gas lease transfers. If the regulation afforded by the Act, the applicable state statutes and the interest of the Company in continuing service is found by experience to be inadequate, further legislation, state or Federal, may be required. It is no justification for the Power Commission to extend the Act beyond its clear applicability that "experience may disclose that it

should have been made more comprehensive." *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 617.

## II.

### **Transfers of Gas Leases on Undeveloped Acreage Are Activities of Production and Gathering Exempted from the Applicability of the Natural Gas Act.**

By Section 1 (b) of the Natural Gas Act, its provisions are made inapplicable to

- (1) any transportation or sale of natural gas other than transportation in interstate commerce or sale in interstate commerce for resale,
- (2) local distribution of natural gas or to the facilities used for such distribution,
- (3) production or gathering of natural gas.

We are concerned only with the exceptions relating to production or gathering. It is established in the decisions of this Court that the exemption goes only to the activity of producing or gathering, *Colorado Interstate* case, *supra*, at page 603, and is to be strictly construed, *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, 691. It is also clear from these same cases that the activity of production or gathering is excepted from the regulatory jurisdiction of the Power Commission even when such activities are carried on by a natural-gas company otherwise subject to regulation.

In *Colorado Interstate* case, *supra*, at page 603, this Court said, "For example, it (The Act) makes plain that the Commission has no control over the drilling and spacing of wells and the like." These and similar activities are thereby defined as activities of production or gathering. Surely, then, the activity of acquiring or transferring

leases which occurs prior to drilling and spacing is also an activity of production or gathering.

Production of gas is the ultimate objective to be attained in securing a gas lease. The activity of securing and exchanging leases relates only to production and to no other phase of a natural gas company's operations. This activity and its objective, production, is completed before the incidents of Power Commission jurisdiction attach. It is an integral part of the production and falls within the field of regulation left to the states.

The express legislative exception from Power Commission authority over production and gathering cannot be overridden by an "implied obligation" owing its existence solely to administrative zeal.

### III.

#### **Exercise by the Power Commission of Jurisdiction over Lease Transfers Will Raise a Conflict Between State and Federal Authority.**

The Kansas Hugoton Field is a common source of supply within the meaning of the Kansas statutes relating to conservation of natural gas (See 55-702, Appendix, p. 17). The Corporation Commission has and exercises jurisdiction over production, gathering and marketing of natural gas in the Field.

Free exchange of leases has been encouraged by the Corporation Commission as essential to securing orderly development of the Kansas Hugoton Field (See statement *supra*, pp. 2-3). In its Brief, the Power Commission derides the Corporation Commission's "encouragement" as falling short of a claim or assertion of right to regulate or control the transfer of leases (P. C. Brief, I. B. 1). Perhaps our position was understated. Up to now, "encour-



agement" has been enough to secure the desired result. If encouragement of lease exchanges falls short and such exchanges are necessary to securing orderly development or prevention of waste or protection of correlative rights of and in the common source of supply, appropriate orders implementing the powers conferred by our state legislature (55-702, 55-704, Appendix, pp. 17, 18) will issue.

If and when the exercise of that power in the Corporation Commission becomes necessary, it must not depend for its efficacy on the consent of the Power Commission. Such dependence would raise a conflict between Federal and state authority which this Court has stated Congress meticulously sought to avoid in the Natural Gas Act.

*Public Utilities Co. v. United Fuel Gas Co.*, 317 U. S. 456.

*Illinois Nat. Gas Co. v. Central Ill. Pub. Serv. Co.*, 314 U. S. 498.

*Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591.

*Colorado Interstate Gas Co. v. Federal Power Comm.*, 331 U. S. 682.

*Panhandle Eastern Pipe Line Co. v. Public Service Comm.*, 332 U. S. 507.

We believe our "deep concern" with the jurisdictional questions involved is justified.

#### IV.

#### **The Courts Below Properly Refused the Injunction Applied for by the Power Commission.**

The Power Commission sought the injunction pursuant to Section 20 (a). That section reads in part as follows:

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts

or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States \* \* \* to enjoin such acts or practices \* \* \*

In its Brief (P. C. Brief, II, A.), the Power Commission recognizes that its order of November 10, 1948, had to be valid to draw to it the injunctive aid requested. It argues that the order was valid. Our view is and we believe we have demonstrated that a transfer of undeveloped gas leases is beyond the applicability of the Act and, therefore, beyond the Power Commission's jurisdiction. The Power Commission's order of November 10, attempting to control the transfer, is unauthorized by the Act and lacks any validity. Ignoring it cannot constitute violation of the Act or any rule, regulation or order thereunder. An injunction to enforce the invalid order was properly refused.

The Power Commission argues further (P. C. Brief, II, B.) that the District Court below should have granted the injunction in the exercise of its general equity powers. Why the Power Commission requested the exercise of such powers is not clear, unless it desired to avoid the argument as to its jurisdiction. Whatever the reason was, it now asserts, in support of this argument, that it has "jurisdiction over at least some transfers of gas reserves." Were that the case, Section 20 (a) would have been sufficient. Jurisdiction in the Power Commission to issue the order of November 10, 1948, was essential to injunctive assistance to secure its enforcement and that jurisdiction was lacking.

**CONCLUSION.**

The Power Commission has no authority under the Natural Gas Act to regulate or control the transfer, by a natural-gas company, of undeveloped gas reserves.

The Courts below properly refused the injunction sought and the decision of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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## APPENDIX.

Portions of Chapter 55, Article 7 of the 1947 Supplement to the General Statutes of 1935 are set out below:

"55-702. Definitions. That the term 'waste' as herein used, in addition to its ordinary meaning, shall include economic waste, underground waste and surface waste. Economic waste as used in this act, shall mean the use of natural gas in any manner or process except for efficient light, fuel, carbon black manufacturing and repressuring, or for chemical or other processes by which such gas is efficiently converted into a solid or a liquid substance. The term 'common source of supply' wherever used in this act, shall include that portion lying within this state of any gas reservoir lying partly within and partly without this state. The term 'commission' as used herein shall mean the state corporation commission of the state of Kansas, its successors, or such other commission or board as may hereafter be vested with jurisdiction over the subject matter of this act."

"55-703. Production regulations, rules and formulas. That, whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently

produced without waste. \* \* \* The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply: \* \* \*

"55-703a. Well spacing and orderly development. The drilling and completion of a gas well shall not of itself entitle said well to an allowable for production; and the commission may, in its discretion, provide for well spacing in any such common source of supply and provide for the orderly development thereof."

"55-704. Rules and regulations authorized; notice and hearings. The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act \* \* \* and as the commission may find necessary and proper to carry out the spirit and purpose of this act. \* \* \*"

"55-705a. Certificate required; notice and hearing. Before any gas shall be produced from a well producing gas only, or from a well which is primarily a gas well, for any of the purposes specified in section 2 (55-702) of this act, a certificate shall be obtained from the commission for the construction of the facilities necessary or required and/or the utilization of the gas in the manner and for the purposes intended: \* \* \*"



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# Supreme Court of the United States

OCTOBER TERM, 1948.

No. 558.

FEDERAL POWER COMMISSION,

*Petitioner,*

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*

On Writ of Certiorari to the United States Court of Appeals  
for the Third Circuit.

## BRIEF FOR PANHANDLE EASTERN PIPE LINE COMPANY.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

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No. 558.

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FEDERAL POWER COMMISSION,

Petitioner,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Third Circuit.

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**BRIEF FOR PANHANDLE EASTERN PIPE LINE  
COMPANY.**

**Opinions Below.**

The findings of fact and conclusions of law of the District Court appear in the Record (R. 60-66). The opinion of the Court of Appeals for the Third Circuit, written by Judge Goodrich (R. 74-81), is reported at 172 F. 2d 57.

**Statute Involved.**

The pertinent statute is the Natural Gas Act of 1938 (Act of June 21, 1938, c. 556, 52 Stat. 821), as amended by the Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U. S. C. 717 f. f.

## Statement.

The Panhandle company is engaged in transporting and selling natural gas in interstate commerce. It operates a pipe line system extending from Texas to Michigan. It is also engaged in producing natural gas, with gas leases and contracts for purchase of gas in Texas, Oklahoma and Kansas.

The Natural Gas Act of 1938 grants regulatory authority to the Federal Power Commission (1) over transportation of natural gas in interstate commerce and (2) over sale of natural gas in interstate commerce for resale to the public. At the same time the Act, by section 1(b), declares that its provisions

“shall not apply . . . to the production or gathering of natural gas”.

**Transfer of gas leases to Hugoton Production Company and declaration of dividend.** On October 11, 1948, Panhandle transferred to Hugoton Production Company (a Delaware corporation which Panhandle caused to be organized in September, 1948) gas leases on 97,000 acres located in Grant and Stevens Counties, Kansas, along with the sum of \$675,000 in cash, as consideration for the purchase of 810,000 shares of Hugoton's common stock. Panhandle retained the option to purchase the gas produced from such acreage after January 1, 1965. The acreage is undeveloped and is not connected with any pipe line system (R.4-5; 24-25; 61).

As part of the same transaction, Panhandle declared a dividend to the holders of its common stock, payable in common stock of Hugoton at the rate of one-half share for each share of common stock of Panhandle, the dividend

comprising the entire 810,000 shares of Hugoton stock acquired by Panhandle. The dividend was payable November 17, 1948, to stockholders of record October 29, 1948 (R. 5; 25; 29-32; 62-63).

The gas reserves under the leases are estimated to be 700 billion cubic feet. It was contemplated that Hugoton would develop the acreage and sell a part of the gas before January 1, 1965,—and under date of October 18, 1948, Hugoton entered into a contract with Kansas Power and Light Company providing for the sale to Kansas Power and Light for the period of 15 years (November 1, 1949 to November 1, 1964) of gas to be produced from such leases. The contract provided that the gas sold is to be produced from wells located in Kansas, and Kansas Power and Light agreed that the gas is to be consumed by it or sold by it for consumption within Kansas. The total volume of gas to be sold by Hugoton to Kansas Power and Light is estimated at 300 billion cubic feet, so that Panhandle will retain a call after January 1, 1965 on the remaining 400 billion cubic feet (R. 27; 61-62).

Panhandle still owns or controls, after transfer of such leases to Hugoton, over 6 trillion cubic feet of gas, or more than enough gas reserves to serve its entire system for more than twenty-five years. This takes no account of additional gas reserves constantly being acquired (R. 27-28).

The transfer of gas leases to Hugoton made no substantial impairment in the ability of Panhandle to transport and sell natural gas in interstate commerce. It has plenty of gas in the ground, more gas in the ground than pipe line capacity to transport such gas. The Commission conceded this in the District Court:

“Mr. Tarver: Panhandle has no shortage of gas in the ground, and there is no contention that it has,

but it does have a shortage of pipe line facilities" (R. 46).

The gas production leases disposed of came to less than 5 percent of the total gas under control of Panhandle, as of the date of the transfer (R. 27), without taking into account the constant additions to gas reserves.

It has been the practice in the natural gas industry to trade freely in gas leases, without seeking approval of the Federal Power Commission. The Commission in the past has never asserted the right to regulate such transactions (R. 28; 62).

The transaction received publicity in the press. Panhandle informed the Commission of it informally on October 12, 1948 (R. 28).

On October 29, 1948, Panhandle delivered to United States Corporation Company, transfer agent of Hugoton stock, a certificate representing 810,000 shares of common stock of Hugoton registered in the name of Panhandle and endorsed in blank. Pursuant to the directions of Panhandle, United States Corporation Company caused such shares of stock to be transferred to the names of the stockholders of record of Panhandle on October 29, 1948, caused Federal transfer stamps to be affixed and cancelled, and made out new certificates in the names of such persons and inserted the same in envelopes ready to mail, intending to mail such certificates on November 15 and November 16, 1948. These preparations were halted on November 13, when a restraining order was issued (R. 25-26; 32-34; 63).

**Orders of Federal Power Commission.** On October 26, 1948, the Commission issued an order instituting an investigation (stated to be in pursuance of Section 14 of the Natural Gas Act) as to the transfer of the gas leases. That order was not an assertion of regulatory power by the

Commission, since by the terms of Section 14 of the Act the Commission's investigatory powers go beyond its regulatory powers.

On November 10, 1948, however, the Commission entered a supplementary order directing Panhandle and Hugoton to show cause why the Commission should not direct them to cancel the transfer of the gas leases from Panhandle to Hugoton and the issuance of the capital stock of Hugoton to Panhandle, and why the Commission should not direct Panhandle to refrain from transferring the capital stock of Hugoton by way of dividend or otherwise. The Commission's order also purported to direct maintenance of the *status quo* pending such determination (R. 5-7; 11-18; 63).

**The Proceedings in the District Court.** On November 13, 1948, the Commission brought this suit in the United States District Court for the District of Delaware, requesting an injunction to enforce its direction to maintain the *status quo* pending hearing and determination by the Commission of the questions presented by its order of November 10, 1948. At the same time the Commission moved for preliminary injunction to prevent delivery of the Hugoton stock certificates.

The complaint filed by the Commission alleged that the action arises under Sections 20(a) and 22 of the Natural Gas Act. (The Commission amended its complaint at the hearing before the District Court to state that the action also arises under the general equity powers of the court.)

The complaint set forth the transfer of the gas leases from Panhandle to Hugoton, the issuance of the stock of Hugoton, the declaration of such stock as a dividend to the stockholders of Panhandle, and the issuance by the



Commission of its orders of October 26, 1948 and November 10, 1948.

The complaint alleged (when read with Paragraphs (c) to (l) inclusive, and (r) to (s) inclusive of the Commission's order of November 10, 1948 which are incorporated by reference in the complaint) that in rate proceedings back in 1942 certain of the gas leases transferred by Panhandle had been included in Panhandle's rate base, and that delay rentals, renewal payments and other exploration and development costs relating to such leases had since been included in Panhandle's operating revenue deductions. Also that in 1946 and 1947 Panhandle had applied to the Commission under Section 7 of the Natural Gas Act for certificates of convenience and necessity with respect to a proposed enlargement of its interstate pipe-line system by construction of Group "A", Group "B" and Group "C" facilities; and that in presenting to the Commission evidence of adequate gas reserves Panhandle had included as a part of its total gas reserves the acreage subsequently transferred to Hugoton. The complaint asserted that by reason of the foregoing facts, Panhandle *may* have pledged or dedicated its reserves and that "it *may* be that defendant could not lawfully transfer to Hugoton the natural-gas leases, without prior authorization by the Commission based on a finding that the public convenience and necessity permitted such transfer" (emphasis supplied).

The District Court, after hearing, denied preliminary injunction. The Commission appealed to the Court of Appeals for the Third Circuit. That Court affirmed the order of the District Court denying preliminary injunction. Successive restraining orders, however, have prevented distribution of the Hugoton stock certificates.

7.

**Intervention of Kansas State Corporation Commission.**  
In the Court of Appeals the Kansas State Corporation Commission was allowed to intervene in order to protect its interests (R. 74).

The petition of the Kansas State Corporation Commission showed that it is charged with jurisdiction over production of natural gas in Kansas, as well as with regulation of public utilities; that it issues orders regulating production of natural gas in the Hugoton Field; that the transaction sought to be set aside will make efficient gas service available to consumers in Kansas.

The petition also showed that free trading in leases is in the public interest and has been encouraged by the State Corporation Commission, and that it is a practice over which the State Corporation Commission has and exercises jurisdiction (R. 70-73).

### **Ground of Decisions Below.**

The ground of decision taken by the District Court and by the Court of Appeals was that the transaction attacked by the Federal Power Commission had to do with production of natural gas; that the Natural Gas Act by explicit provision excluded "production or gathering of natural gas" from the Commission's jurisdiction; and that the incidents counted on by the Commission as bringing the case within the reach of its authority did not carry significance.

Both courts also pointed out that it has been the practice in the industry to deal freely in gas leases, and that the Commission has never heretofore asserted the right to regulate transfers of such leases. The Court of Appeals also referred to the Commission's regulations; it being

stated in the regulations that the Natural Gas Act did not give the Commission regulatory power over production of natural gas.

### Summary of Argument.

Our argument is divided into two principal points.

Point I is that the Natural Gas Act does not authorize the Federal Power Commission to regulate transfers of gas leases. This conclusion is supported by five propositions:

A. Authority over transfers of gas leases has been specifically withheld from the Commission by Section 1(b) of the Act:

In support of this we cite Section 1(b) of the Act which provides that "the provisions of this Act . . . shall not apply . . . to the production or gathering of natural gas"; and we also cite the decisions of this Court which consider the import of that clause in the light of the Act as a whole.

B. Since the language of the Act is unambiguous legislative history is of little benefit. But actually the legislative history of the Act bears out the fact that Congress deliberately denied to the Commission regulatory power over production activities. The legislative history further bears out the fact that no distinction may properly be drawn between "production or gathering" and "production or gathering facilities".

C. The exclusion of regulation of production and gathering of natural gas was for the set purpose of preserving authority in that field to the states.

The assumption by the Federal Power Commission of authority over transfers of gas leases would encroach upon the regulatory powers of the states and would defeat the express intent of the Natural Gas Act. This is borne out by the position taken by the Kansas State Corporation Commission in this case.

D. The rules and practices of the Federal Power Commission itself are powerful proof that it possesses no authority over activities in gas leases. Although the Commission has had a set of rules for eleven years, the rules have never suggested that dealings in gas leases should be submitted to the Commission for approval. On the contrary, the Commission has acknowledged in its own "General Rules and Regulations" that the Natural Gas Act gives it no jurisdiction over production activities. Until this case came up, the Commission never asserted the right to regulate transfers of such leases, which have been freely disposed of in the natural gas industry.

E. Jurisdiction of the Federal Power Commission over transfers of gas leases, denied by the plain language of Section 1(b) of the Act, may not be built up from other sections of the Act, as urged by the Commission.

Sections 5(b), 6(a) and (b), 8(a), 9(a), 10(a) and 14(b), cited by the Commission, have nothing to do with the activity of producing or gathering natural gas. These sections deal with investigations, accounting methods and reports. This Court has held that such sections were designed to aid the Commission in its rate-making functions.

Also, Sections 4 and 5, granting control over rates, and Section 7, granting control over transportation facilities, have nothing to do with the activity of producing gas.



The Commission's argument that Panhandle may have irrevocably "dedicated" gas reserves to the service of its transportation facilities is unsound. Not only does it present practical difficulties which cannot be answered, but also, if countenanced, it would permit the Federal Power Commission to move in on a broad front and assert regulatory power over all production facilities of virtually all natural gas companies—to the utter disruption of regulation by the states over such production.

There is no need for concern about the possibility that in the absence of Commission control over transfers of gas leases a natural gas company might dispose of so many of its reserves that it would give up its "life blood" and could no longer serve its pipe line. A practical safeguard against this contingency lies in the fact that an interstate pipe line company represents a huge investment—over \$100,000,000 in Panhandle's case—and Congress surely appreciated that no company would deliberately jeopardize such an investment by dissipating its gas reserves. As recently as March 30, 1949, the Commission itself, in passing upon a certificate application by another company, recognized the significance of management judgment in maintaining adequate gas reserves.

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Point II of our argument is that the complaint did not show any basis for the issuance of an injunction, and that the Courts below were right in so holding.

Under this point, we demonstrate in Subdivision A that no basis for relief was shown under Section 20(a) of the Natural Gas Act, which delineates the instances in which the Commission may apply to a District Court for an injunction. We show that the Commission did not bring its case within this section.



Under Subdivision B of Point II, we show that the Commission made no case for an injunction by invoking the general equitable powers of the District Court. In the first place the doctrine that the Courts will aid an administrative body in protecting its jurisdiction has no application in a case where, as here, the organic statute by specific provision (Section 20) defines the situations in which the administrative agency has the right to go to the courts for injunctive relief. Furthermore, under this doctrine probable jurisdiction in the administrative agency must be made to appear, and in the present case probable jurisdiction in the Federal Power Commission was lacking.

### Argument.

#### I.

**The Natural Gas Act does not authorize the Commission to regulate transfers of gas leases. This is manifest on the face of the act and in the Commission's own rules.**

The matters at issue are governed by the Natural Gas Act of 1938.

The intent of Congress in passing that act was to cover under Federal regulation the transportation of natural gas in interstate commerce and the sale in interstate commerce of such gas for resale to the public, such Federal regulation to be administered by the Federal Power Commission.

It was at the same time the intent of Congress, expressed in unmistakable terms, to leave to State regulation the following activities: any other transportation and sale, local distribution of natural gas, and production and gathering of natural gas.

It is crystal clear that Congress did not intend to grant to the Federal Power Commission any degree of authority over gas acreage. Gas acreage is a phase of production, actual in some cases, potential in others. Regulation over gas acreage was left with the States; and assumption by the Commission of authority in that field would defeat the deliberate intention of Congress in enacting the Natural Gas Act.

While the Commission argues in this case that it does have control over some phases of production of natural gas, the Commission's own rules and regulations, as we shall show later, acknowledge its lack of authority over matters concerned with production.

**A. Authority over transfer of gas leases has been specifically withheld from the Commission by Section 1 (b) of the Natural Gas Act.**

Section 1 (b) of the Natural Gas Act provides:

"The provisions of this act . . . shall not apply . . . to the production or gathering of natural gas."<sup>(1)</sup>

There is no need to labor the meaning of those plain words. The plan of regulation designed by Congress did not embrace control of production of natural gas by the Commission.

(1) The full text of Section 1 (b) is as follows:

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 612 (1944);

*Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 602 (1944);

*Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 690 (1947);

*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 516 (1947).

In the *Hope Natural Gas* case, *supra*, this Court stated:

"As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over the 'production or gathering of natural gas'. § 1(b)" (pages 612-613).

In the *Colorado Interstate* case, *supra*, it was decided that in rate making the Commission might include production properties in the rate base of a natural gas company, this by reason of certain sections of the Act relative to rate making. Mr. Justice Douglas, who wrote for the majority, went on to point out:

"That does not mean that the part of § 1(b) which provides that the Act shall not apply 'to the production or gathering of natural gas' is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas" (pages 602-603).

**B. The deliberate denial to the Commission of regulatory power over transfers of gas leases is borne out by the legislative history of the Act.**

The Commission devotes a substantial portion of its brief to a discussion of the legislative history of the Natural Gas Act and its predecessor bills.

In a case such as this, where the language of the statute is unambiguous in meaning, legislative history is of little benefit.

This Court said in *Packard Motor Car Co. v. National Labor Relations Board*, 330 U. S. 485, 492:

"We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."

Nevertheless the fact is that the legislative history of the Natural Gas Act bears out the fact that Congress deliberately intended to deny to the Federal Power Commission any regulatory authority over transfers of gas leases.

The following is the interpretation put by Dozier A. DeVane, Solicitor for the Federal Power Commission, upon an earlier bill substantially similar to the Natural Gas Act (from Report of Hearings before Subcommittee of Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, Second Session, on H. R. 11662):

"Mr. Cole [Congressman]. Does this bill give anywhere the Commission power over the source of natural gas in the different fields in a manner which we might call comparable to that which your Commission now has over hydro-electric generating plants?"

"Mr. DeVane. It does not; no, it does not attempt to regulate the gathering rates or the gathering business. Section 11, I believe it is of the bill deals with that" (p. 34):



A brief in support of constitutionality of the Act submitted by Dozier A. DeVane, and Thomas J. Tingley, Assistant Solicitor of the Federal Power Commission, appearing in said Report at page 17, stated:

"The bill makes no attempt to regulate the production or gathering facilities of a natural gas company, this function being purely local in character,  
 . . . ."

This should dispose of the argument made in the Commission's brief that there should be a distinction between "production or gathering" and "production or gathering facilities."

**C. The assumption by the Commission of authority over transfers of gas leases would encroach upon the regulatory powers of the States and would defeat the deliberate purpose of the Natural Gas Act.**

The decisions of this Court leave no doubt that exception from the Commission's jurisdiction of regulation of the production and gathering of natural gas was for the deliberate purpose of preserving authority in that field to the States.

This Court, in *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, said, at page 690:

"Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters."

The Commission in its brief does not dispute this principle. Nor does it dispute the fact that Kansas and other



states have adopted statutes relating to the proration and conservation of natural gas for the purpose of preventing uneconomical development and waste of this natural resource.<sup>(2)</sup>

However, the Commission finds fault with the finding by the Court of Appeals (R. 76) that the states are exercising their regulatory powers in the field of transfers of gas leases. The Commission claims that despite this finding the fact is that the states do not attempt to regulate the transfer or disposition of gas leases or reserves.

The Commission has missed the significance of the position of the Kansas State Corporation Commission in this suit. The position of the Kansas Commission is that free traffic in leases and production rights in the Hugoton Field "is essential to the discharge of the statutory duty imposed upon it to secure the orderly development of the natural resources within the State of Kansas" (R. 73).

The manner in which this factor is related to proration and conservation is clearly explained in the petition for intervention of the Kansas State Corporation Commission as follows (R. 72):

"\* \* \* Free trading of leases and production rights among the various purchasers to enable them economically to connect producing wells to pipeline facilities has resulted in the prompt production and utilization of gas as the wells are completed. This tends to eliminate unproduced prorated allowable production, facilitates regulation of gas taking to

<sup>(2)</sup> Kansas: Chap. 55, Secs. 701-713 (Gen. Stat. 1947 Supp.); Michigan: Title 13, Chap. 97, Secs. 13.138(1)-13.140(10) (Stat. Ann. 1947 Supp.); Oklahoma: Title 52, Chap. 3, Secs. 81-247 (Stat. of 1941 as amended); Texas: Title 102, Art. 6008 *et seq.* (Vernon 1925, with 1948 Supp.).

meet the market demands and helps to protect the owner of newly developed acreage against drainage by other outlets in the vicinity of his well. Above all, it has enabled purchasers to 'block', or consolidate, their respective production acreage to or around their pipeline transportation. This latter practice has been encouraged by the Corporation Commission because it helps to prevent undeveloped islands of productive acreage and is an important factor in securing orderly development of the Kansas Hugoton Field."

By reason of the foregoing, the Kansas State Corporation Commission asserts in its petition that "the practice of exchanging leases among purchasers within the State of Kansas is an activity related to production and gathering of natural gas over which the Corporation Commission has and exercises jurisdiction" (R. 73). Since the Kansas State Corporation Commission believes that the most effective way of exercising this jurisdiction is to permit free traffic in leases and production rights, any effort on the part of the Federal Power Commission to restrict such traffic would necessarily conflict with the power of the State and run counter to the basic purpose of the exception from Federal jurisdiction of production and gathering in accordance with Section 1(b) of the Natural Gas Act.

**D. The rules and practices of the Commission are powerful proof that it possesses no authority over activities in gas leases.**

(1) The rules and regulations of the Commission.

It is of significance that although the Commission has had a set of rules for eleven years, the rules have never suggested that dealings in gas leases by a natural gas

company should be submitted to the Commission for approval.

On the contrary, the "General Rules and Regulations" of the Commission as they stand today provide:

"The Federal Power Commission is of the opinion that it was the intent of the Congress that the control of production or gathering of natural gas should remain a function of the States and that the Natural Gas Act should not provide for regulation of those subjects" (18 C. F. R., Chap. I, Sec. 03.79).

This sentence from the Commission's own rules is a plain acknowledgment that the Natural Gas Act gives it no control over production of natural gas and no standing to bring the present suit.

The Commission, in its annual report for 1946, made the same confession of lack of authority:

"A major problem that has come before the Commission in rate proceedings arises from the fact that the provisions of the Natural Gas Act are specifically made inapplicable to 'the production or gathering of natural gas.' In several instances where pipe line companies were also engaged in the production and gathering of gas, the Commission in its rate cases interpreted this exclusion to refer to the activities of producing and gathering, but permitting the Commission to consider the costs related to producing and gathering facilities in fixing interstate rates for resale" (pages 52-53).

## (2) The practice of the Commission.

It is also significant that the present endeavor to assert jurisdiction over dealings in gas leases is unique in the history of the Commission, although the Natural Gas Act has been on the books for eleven years.

During the eleven year period it has been the practice in the natural gas industry (well known to the Commission and found as a fact by the District Court) to deal freely in gas leases. It is a common incident to exchange gas leases, to dispose of them to other concerns in the industry, to drop them altogether.

Until this case came up the Commission never asserted the right to regulate transfers of such leases. This also was found as a fact by the District Court.

In similar situations involving an attempted exercise of power on the part of this Commission or other administrative bodies, the Courts have given great weight to the failure previously to exercise or assert that power.

*Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351 (1941);

*Border Pipe Line Company v. Federal Power Commission*, 171 F. 2d 149 (C. A. D. C.) (1948).

**E. Jurisdiction of the Commission over transfers of gas leases, denied by the plain language of Section 1(b) of the Act, may not be built up from other sections of the Act.**

Despite the specific exclusion of authority to regulate production and gathering found in Section 1(b) of the Act, the Commission points to other provisions of the Act, and from these suggests that this exclusion "was not intended to extend to all phases of production or gathering" and "was not intended to deny to the Commission jurisdiction over all transfers of gas reserves".

The Commission's argument, in effect, is that Congress did not mean what it said in Section 1(b).



(1) Provisions of the Act as to investigations, accounting practices and reports.

The Commission cites various sections of the Act which it contends vest "jurisdiction in the Commission in regard to both production and gathering properties and gas reserves." It refers to Sections 5(b), 6(a) and (b), 8(a), 9(a), 10(a) and 14(b).

The fact is that these sections have nothing to do with the activity of producing or gathering natural gas. Sections 5(b), 6(a) and 14(b) deal with investigations. Sections 8(a) and 9(a) deal with accounting methods. Sections 6(b) and 10(a) relate to reports to be filed.

This Court in *Colorado Interstate Gas Company v. Federal Power Commission*, 324 U. S. 581, considered the import of these provisions and concluded that they were designed to aid the Commission in its rate-making functions. The Court said, at page 602:

"These provisions all suggest that when Congress designed this Act, it was thinking in terms of the ingredients of a rate base, the deductions which might be made, and the additions which were contemplated."

While holding that Section 1(b) "must be reconciled with the explicit provisions which describe the normal conventions of rate-making" the Court nevertheless went on to say: "Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas."

The Commission finds itself in a dilemma when it urges that references to production properties in these provisions may lead to the conclusion that regulation of transfers of gas leases should be read into the Act. Certainly the Con-



gress which so meticulously designed the Act so as to aid the Commission in its rate-making functions, would not, had it intended to impose any form of control over transfers of gas leases, have been so lax as to have omitted any form of machinery under which the Commission could operate to put that control into effect.

The answer is again that Congress acted with set purpose when it excluded the Commission from jurisdiction over production and gathering of natural gas, and with similar design omitted from the Act any form of procedure by which the Commission might require natural gas companies to apply for permission to transfer gas leases.

(2) Provisions as to rates and service; the dedication theory.

In an effort to climb over the barrier erected by Section 1(b) of the Natural Gas Act, the Commission alleged in its complaint that certain of the gas leases involved in the transfer to Hugoton had been included by Panhandle in its rate base, and also that Panhandle in applying for certificates of public convenience and necessity for construction of additional pipeline facilities had mentioned some of the gas leases as being part of its gas reserves, and so might have "dedicated" such gas production leases to the service of its transportation facilities. Reliance is placed on Sections 4 and 5, granting control over rates, and on Section 7, granting control over transportation facilities.

The amounts involved are trivial, and it is undisputed that the acreage is undeveloped and, unconnected with any pipeline. Moreover, the price at which the gas will be sold by Hugoton is satisfactory to the Kansas State Corporation Commission, and, in the opinion of that body "promotes the

welfare of the natural gas industry in Kansas and the welfare of the people of Kansas" (R. 71).

Nevertheless, the contention is made that transfer of these gas leases might result in unjust and unreasonable rates to consumers, and might also have a bearing on the usefulness or service life of the transportation facilities, so that no transfer of acreage may be made without the Commission's prior approval.

The argument comes to this, that any item of gas reserves owned at the time of the establishment of a rate base or of the issuance of a certificate for construction or enlargement of a pipeline, becomes frozen, not to be thawed out except by the Commission.

As the Court of Appeals pointed out, this argument proves too much. If it were sound, the Commission could move in on a broad front and assert regulatory power over all production facilities of all natural gas companies—to the utter disruption of regulation by the States over such production.

The Commission's "dedication" argument projects practical difficulties that the Commission has not faced up to.

Would the Commission say that the gas reserves were so firmly committed to the interstate traffic that the natural gas company could not sell gas from the reserves to intrastate customers without the approving nod of the Commission?

Would the Commission maintain that in the interest of interstate transportation it can compel the natural gas company to drill wells on these undeveloped reserves and to connect the wells to the interstate pipe line system?

Would it say that the gas reserves were so "pledged" or "dedicated" that the pipe line company could not dis-

continue rentals and abandon gas leases believed to be unprofitable, except on Commission approval?

The Commission, we take it, would make none of these contentions. Yet these consequences would follow if the "dedication" theory were countenanced.

Aside from these practical problems, the plain fact of the matter is that Sections 4, 5 and 7 of the Act, on which the Commission relies for this argument, relate only to the transportation or sale of natural gas and have nothing to do with the activity of producing gas. In these sections Congress took pains to describe the powers conferred on the Commission as powers over "transportation or sale of natural gas subject to the jurisdiction of the Commission" (Section 4 (a), (b) and (c), and Section 5 (a)), "transportation facilities" (Section 7(a)), and "facilities subject to the jurisdiction of the Commission" (Section 7 (b)). These limitations the Commission asks the Court to disregard.

This Court, in *Colorado Interstate Gas Company v. Federal Power Commission*, 324 U. S. 581, made mention of Sections 4, 5 and 7 of the Act as marking the distinction between transportation and sale on the one hand and producing and gathering on the other hand. It said at page 598:

"Transportation and sale do not include production or gathering. Other sections emphasize that distinction. Thus §4 and §5, the rate regulating provisions of the Act, refer to charges for the 'transportation or sale of natural gas, subject to the jurisdiction of the Commission.' §7(a) relates to the extension or improvement of 'transportation facilities'; §7(b), to the abandonment of 'facilities subject to the jurisdiction of the Commission'; §7(c) to the construction or extension of facilities

for the 'transportation or sale of natural gas, subject to the jurisdiction of the Commission'."

### (3) The "life blood" doctrine.

The Commission in its brief expresses concern over the possibility that, in absence of Commission control over transfers of gas leases, a natural-gas company might dispose of so many of its reserves that it would give up its "life blood", could no longer serve its pipe line, and would bring about an unregulated abandonment.

The "life blood" doctrine overlooks the practical side of the matter which Congress surely appreciated,—that an interstate pipe line represents a huge investment which no company would deliberately jeopardize by dissipating its gas reserves.

As Mr. Maguire, Chairman of the Board of Panhandle, explained in an affidavit submitted in this case (R. 49):

"It is to be borne in mind that Panhandle has more than \$100,000,000 investment in transmission facilities. In my opinion, the Board of Directors will continue to protect Panhandle's huge investment in such transmission facilities by maintaining an adequate gas reserve."

It is safe to assume that Congress, in denying the Federal Power Commission authority over gas reserves, realized that in state control and in management control there existed ample safeguards for conservation and preservation of those reserves.

The Commission is taking an inconsistent position in this connection; the fact is that the realities in the matter have not escaped the Commission's attention when dealing with an application for the construction of a pipe line system by another company approved recently.

In its opinion in that case, the Commission expressed its view that proof of sufficient gas reserves to assure operation of the pipe line facilities over a period of future years was not necessary where there was a probability that, in the exercise of good business judgment, the applicant would obtain additional gas supplies in the future (Opinion No. 177, issued March 30, 1949 in the *Matter of Texas Gas Transmission Corporation*, Docket No. G-859 and other consolidated dockets). The Commission said (p. 16):

"It appears from such testimony that both the geology and the intensive exploratory activity in the region point to a reasonable likelihood of the discovery of additional gas reserves in substantial volume. To refuse to give weight to this probability would be justified only by a conclusion that Texas Eastern will not share with the other pipelines in contracting for gas from new discoveries in the region. This we cannot do for Texas Eastern has shown to our satisfaction that it is in a good position, both experience-wise and from an economic standpoint, to conclude needed purchases from developing reservoirs."

## II.

**The complaint did not show any basis for issuance of injunction.**

The courts below were right in holding that the Commission made no case for injunctive relief.

**A. No basis for relief was shown under Section 20(a) of the Natural Gas Act.**

Under Section 20(a) of the Natural Gas Act the Commission may apply to a district court for an injunction against acts or practices



"which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation, or order thereunder."<sup>(3)</sup>

The complaint alleges no violation or threatened violation of the Natural Gas Act or of any rule of regulation. Moreover, the Commission does not urge that its case is grounded upon any such violation.

The Commission argues that its claim for injunctive relief under Section 20(a) is based upon the part of its order of November 10, 1948, which directed that pending hearing and determination on the question whether the transfer by Panhandle to Hugoton of gas leases should be set aside, the *status quo* should be maintained and Panhandle should refrain from distributing the stock of Hugoton.

The Court of Appeals fully considered this argument, but held that the purported order of the Commission of November 10, 1948, directing maintenance of the *status quo* was "not a valid order because beyond commission jurisdiction", and that accordingly "the Commission cannot have court help to enforce it" (R. 80).

This holding was correct. The Commission points to Section 16 of the Act which gives it power to issue "such orders \* \* \* as it may find necessary or appropriate to carry out the provisions of this act". Section 16 most certainly does not warrant the issuance of an order covering a subject matter with respect to which the Commission has no jurisdiction.

In addition, Section 16 does not authorize, nor does any other section of the act authorize, issuance by the Com-

(3) Section 22 of the Act, also referred to in the complaint, is a jurisdictional and venue section which supplements Section 20, but in no way expands upon the instances in which the Commission may seek court aid in accordance with Section 20(a).

mission of an order which imposes a stay or restraint pending an investigation. It is settled that administrative agencies are not vested with judicial power under Article III of the Constitution and receive no implied powers from general principles of equity. *vom Baur, Federal Administrative Law*, Sec. 150 (1947 Cum. Supp.) The governing statute, not general equitable principles, is the guide to an administrative agency's jurisdiction and authority. *Commissioner of Internal Revenue v. Gooch Milling & Elevator Company*, 320 U. S. 418, 420 (1943).

The Commission argues in its brief that the order "no more involved the exercise of judicial power, let alone Article III judicial power, than a Commission order directing a natural-gas company to reduce its rates or prohibiting a company from abandoning service". This analogy is not well taken, because not only does the Commission have full power under Sections 5 and 7 to issue orders reducing rates and denying approval for abandonment of service, but such orders are only to be issued after a hearing on the matter and are definitive and reviewable orders.

The Commission has held no hearing as the basis for its purported restraining order of November 10, 1948, and its direction to maintain the *status quo* is interlocutory and not reviewable. *Federal Power Commission v. Metropolitan Edison Company*, 304 U. S. 375, 384 (1938).

In the only case which has come to our attention on this question, the Court of Appeals for the Fifth Circuit has held that under the Federal Power Act, an analogous statute, only a definitive and reviewable order may be enforced by the district court. *Mississippi Power & Light Company v. Slaff*, 131 F. 2d 148, 150 (1942).

Subjecting the Commission's purported restraining order of November 10, 1948 to any test, either substantive

or procedural, it was beyond the power of the Commission and unenforceable under Section 20(a) of the Natural Gas Act.

**B. No basis for relief was shown by invoking the general equitable powers of the District Court.**

The Commission realized the weakness of its position under Section 20(a) of the Natural Gas Act, because it amended its complaint on the hearing before the District Court so as to invoke the general equitable powers of the Court.

The Commission urges the theory that if it cannot meet the tests of Section 20(a), the Court should nevertheless intervene in the exercise of equitable jurisdiction.

The Commission leans on the cases holding that where an administrative body has been given jurisdiction by Congress over an activity, it may resort to the courts for assistance in protecting that jurisdiction.

We do not question the existence of that rule, nor did the courts below question it.

It has no application, however, in a case, where, as here, the organic statute by specific provision (Section 20) defines the situations in which the administrative agency has the right to go to the courts for injunctive relief. Furthermore, under the "assistance" doctrine probable jurisdiction in the administrative agency must be made to appear. In the present case probable jurisdiction in the Federal Power Commission was lacking, since the Commission was applying for assistance in a field that Congress had told the agency in unmistakable terms to keep out of.

**Conclusion.**

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1948.

No. 558.

FEDERAL POWER COMMISSION,

*Petitioner,*

PANHANDLE EASTERN PIPE LINE  
COMPANY, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT.

**BRIEF FOR INTERVENERS-RESPONDENTS,  
STOCKHOLDERS.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

No. 558.

FEDERAL POWER COMMISSION,

Petitioner,

v.

PANHANDLE EASTERN PIPE LINE COMPANY,

*et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

**BRIEF FOR INTERVENERS-RESPONDENTS,  
STOCKHOLDERS.**

**Opinions Below.**

The findings of fact, conclusions of law and opinion of the District Court appear in the Record (R. 49-56; 60-66). The opinion of the Court of Appeals (R. 74-81) is reported at 172 F. 2d 57.

**Jurisdiction.**

The judgment of the Court of Appeals was entered on January 6, 1949 (R. 81). The petition for certiorari was filed on February 10, 1949, and was granted on March 28, 1949 (R. 87). The jurisdiction of this Court is invoked under 28 U. S. C. §1254.



## Question Presented.

Where the Federal Power Commission, having received ample advance notice that a "natural-gas company" proposed to issue to its stockholders a dividend in kind consisting of the stock of a newly-organized corporation, neither requested delay nor sought restraint of the transaction until after ownership of the new stock had passed from the declaring corporation to its stockholders, should a Federal District Court issue an order purporting to enjoin transfer of title to the stock or, by enjoining delivery to the stockholders of the certificates evidencing ownership of the stock, expose the stockholders to hardship and loss?

## Statement.

Interveners-respondents are holders in the aggregate of approximately 8% of the common stock of Panhandle and of Hugoton (R. 44, 53).

## ARGUMENT.

### POINT I.

**The District Court could not enjoin transfer of the ownership of the Hugoton stock to the Panhandle stockholders, as prayed for by petitioner, because the transfer had taken place before institution of suit.**

The major facts bearing on the ownership of the Hugoton stock were summarized as follows by the District Court in its Findings of Fact (R. 62-63):

"10. On October 11, 1948, the Board of Directors of Panhandle declared a dividend to the holders of

the common stock of Panhandle, payable in common stock of Hugoton at the rate of one-half share for each share of common stock of Panhandle, said dividend comprising the entire 810,000 shares of common stock of Hugoton acquired by Panhandle and all of the outstanding stock of Hugoton. Said dividend was declared to be payable November 17, 1948 to stockholders of record October 29, 1948.

"11. On October 29, 1948, Panhandle delivered to United States Corporation Company, the transfer agent for Hugoton stock, a certificate representing 810,000 shares of common stock of Hugoton registered in the name of Panhandle and endorsed in blank and, pursuant to the directions of Panhandle, said United States Corporation Company caused said shares of stock to be transferred to the names of the stockholders of record of Panhandle on October 29, 1948, caused Federal stock transfer stamps to be affixed and cancelled, and made out new certificates in the names of such persons and inserted the same in envelopes ready to mail, intending to mail said certificates on November 15 and November 16, 1948."

At the hearing before the District Court on November 18, 1948, the following colloquy took place (R. 42):

"Mr. Tarver: \* \* \* It is agreed that there has been no transfer on the transfer books of Hugoton Corporation?"

"Mr. Patterson: Oh, no. Quite the contrary. On the books of Hugoton Corporation the stockholders of record of October 29th are other stockholders and not Panhandle."

Notwithstanding the above facts, petitioner's complaint prayed the court to restrain Panhandle "from transferring the title to such shares of stock to such stockholders (of

Panhandle) or to any other person" and to require Panhandle to cause Hugoton to refrain "from issuing or transferring any of its capital stock to any person" (R. 9).

Obviously this prayer could not be granted if title to the Hugoton stock had passed from Panhandle to its stockholders. Under the authorities, such was unmistakably the case.

### **The Dividend Cases—Trust Fund Doctrine.**

By virtue of the delivery of the 810,000 share certificate of Hugoton stock, endorsed in blank, by Panhandle to Hugoton's transfer agent, for distribution to the common stockholders of Panhandle, such 810,000 shares became in equity the property of the common stockholders of Panhandle (R. 63). The underlying principle is well established. *Bogert on Trusts*, Vol. 1, pages 88, 89 (1935), states:

"If the corporation which has declared the dividend sets apart a fund to pay the dividend, as by opening a dividend account with a bank, it makes itself trustee of the claim against the bank for the persons entitled to the dividend, and such persons are entitled to the proceeds of the claim against the bank, even though the corporation may fail before the dividend is actually paid (*LeRoy v. The Globe Ins. Co.*, 2 Edw. Ch. 656; *Matter of LeBlanc*, 14 Hun (N. Y.) 8, aff'd 75 N. Y. 598; *In re Interborough Consol. Corp.* (D. C.) 267 F. 914.) \* \* \* The dividend account cannot be taken for use in satisfying the creditors of the corporation generally. It is held in trust for the stockholders who have the right to receive the dividend \* \* \*"

See to the same effect *White, New York Corporations* (Bender Ed.), Vol 2, pages 345-7; *Thompson on Corpora-*

tions (3rd Ed. 1927), Sec. 5308; *Ballantine on Corporations* (1946 Ed.), Sec. 238.

In *In re Associated Gas and Electric Co.*, 137 F. 2d, 607, 610 (C. C. A. 2nd 1943), a corporation had opened a special bank account and deposited therein funds to pay a dividend which it had previously declared. In subsequent reorganization proceedings, it was held that the stockholders were entitled to the funds in the account as against the trustees in reorganization. The court said, per Swan, J.:

"Where a corporation has not only declared a dividend but has specifically set apart from its other assets a fund out of which the dividend is to be paid, such fund is held in trust for stockholders entitled to the dividend. *In re Interborough Consol. Corporation*, 2 Cir.; 288 F. 334, 341, certiorari denied sub. nom. *Porges v. Sheffield*, 262 U. S. 752, 43 S. Ct. 700, 67 L. Ed. 1215; *Staats v. Biograph Co.*, 2 Cir., 236 F. 454, 458, L. R. A. 1917B, 728; *In re Interborough Consol. Corporation*, D. C. S. D. N. Y., 267 F. 914, 919."

In *Sherry v. Union Gas Utilities*, 20 Del. Ch. 60, 171 Atl. 188, 190 (1934), Chancellor Wolcott said:

"When a dividend has been declared and moneys deposited for its payment, it has been determined that such deposit unsupplemented by other evidence is affected with a trust in favor of stockholders."

The so-called "trust fund" rule as to dividends has been "consistently followed in New York and elsewhere as the correct rule". Comment (1928) 28 Col. L. Rev. 477, 478; Note (1933) 11 No. Car. L. Rev. 111, 112; Note (1938) 24 Va. L. Rev. 579; Comment (1940) 39 Mich. L. Rev. 59, 64-5.

It applies, of course, to stock dividends and dividends in kind as well as to cash dividends. *Dock v. Schlichter Jute Cordage Co.*, 167 Pa. St. 370, 378-9, 31 Atl. 656 (1895); *Staats v. Biograph Co.*, 236 Fed. 454, 460 (C. C. A. 2nd, 1916); *Peckham v. Van Wagenen*, 83 N. Y. 40, 45 (1880); *Ford v. Easthampton Rubber Thread Co.*, 158 Mass. 84, 32 N. E. 1036 (1893).

The trust fund doctrine has been applied to the precise type of situation presented in the case at bar, viz.: declaration by a corporation of a dividend in the stock of another corporation, followed by delivery by the declaring corporation to the stock transfer agent of a block certificate of the dividend stock with directions to prepare certificates in appropriate amounts for the declaring corporation's stockholders. On such facts the Circuit Court of Appeals for the Ninth Circuit said in *Commissioner v. Scatena*, 85 F. 2d 729, 731 (1936):

"A dividend declared by one corporation of the stock of another corporation is regarded as a cash dividend (Fletcher, Cyc. Corps. §3677, p. 6177), and its value is determined by the actual value of the stock of the subject of the dividend, on the date of the declaration. The lawful declaration of a dividend creates a debt from the corporation to the stockholders, and when a segregation is made to the amount of the dividend, the amount thereof is held by the corporation as trustee for the stockholders. In re Sutherland, 23 F. (2d) 595, 599 (C. C. A. 2); Bryan v. Welch, et al., 74 F. (2d) 964, 970 (C. C. A. 10); Bulger Block Coal Co. v. U. S., 48 F. (2d) 675, 680, 681 (Ct. Cl.); Staats v. Biograph Co., 236 F. 454, 458, L. R. A. 1917B, 728 (C. C. A. 2). Such a dividend cannot be rescinded. Fletcher Cyc. Corps. §3653, p. 6064; Morawetz, Corps. §445, p. 419."



On the principles set forth in the above authorities, equitable title to the Hugoton stock passed to the common stockholders of Panhandle on October 29, fifteen days before this suit was instituted.

**Possession of the Certificates Is Not Essential to Ownership—Intention to Transfer Ownership Is Controlling.**

The findings of fact quoted at pages 2-3, *supra*, show that Panhandle, by October 29, had done everything within its power to transfer the Hugoton stock to its stockholders and had relinquished all control and dominion over it. It is well settled that possession of the stock certificates is not controlling, and that this intention to transfer complete legal title, accompanied by all appropriate and feasible formal acts, is to be given effect.

As was said by this Court in *Richardson v. Shaw*, 209 U. S. 365, 378 (1908):

“... the certificate of shares of stock is not the property itself, it is but the evidence of property in the shares. The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named.”

Referring to the relation of stockholder and corporation and to stock ownership, this Court said in *National Bank v. Watsontown Bank*, 105 U. S. 217, 222 (1881):

“This legal relation and proprietary interest, on which it is based, are quite independent of the certificate of ownership, which is mere evidence of title. The complete fact of title may very well exist without it.”

This is also the established law in Delaware, New Jersey and New York.\* In *Smith v. Universal Service Motors Co.*, 17 Del. Ch. 58, 147 Atl. 247, 248 (1929), Chancellor Wolcott said:

"The status of stockholder in a corporation is not dependent on the issuance to him of a certificate of stock. The certificate is only an evidence of ownership—a muniment of title."

In *Lask v. Bedell*, 91 N. J. Eq. 341, 109 Atl. 849, 850 (Ch. 1919), it was held:

"It is the recognized law of this state that the certificate of stock is merely evidence of ownership and that there need not be a certificate issued and delivered to vest a person with the rights of a stockholder."

In *Hoffman v. Commissioner*, 71 F. 2d 929 (C. C. A. 2nd 1934), a taxpayer desiring to sell stock of a corporation endorsed it in blank and delivered it to his own attorney to be turned over to the purchaser upon compliance with certain formalities. The attorney did not turn the stock over until a subsequent year. The court held that title to the stock passed to the purchaser when it was delivered to the seller's

\* The Delaware law would seem to be controlling on the question of ownership of the Hugoton stock, since Hugoton was organized in Delaware. Restatement, *Conflict of Laws* (1934 Ed.), §182, states:

"Whether a person is a stockholder or other member of a corporation is determined by the law of the state of incorporation."

See also *Seymour v. National Biscuit Co.*, 107 F. 2d 58 (C. C. A. 3rd 1939); *Triplex Shoe Co. v. Rice & Hutchens*, 17 Del. 356, 152 Atl. 342 (S. Ct. 1930); *In re Bashford's Estate*, 118 Misc. 951, 36 N. Y. Supp. (2d) 651 (Surr. Ct., N. Y. Co., 1947); *Marvel, Delaware Corporations and Receiverships* (1939), 136; *American Jurisprudence*, "Corporations", §330.

attorney, and loss on the sale was deductible in the earlier year. Judge Swan said (1930):

"But the law is well settled that nondelivery of possession would not preclude *title to the stock* passing forthwith to Dorman if such was the intention of the parties. *Hatch v. Oil Co.*, 100 U. S. 124, 132, 25 L. Ed. 554; *Hammer v. United States*, 249 F. 336 (C. C. A. 2); *Dahlinger v. Commissioner*, 51 F. (2d) 662 (C. C. A. 3); *Eavenson v. Commissioner*, 51 F. (2d) 664 (C. C. A. 3); *Sanitary Carpet Cleaner v. Reed Mfg. Co.*, 159 App. Div. 587, 145 N. Y. S. 218; *Sherwood v. Commissioner*, 8 B. T. A. 193; *Swenson v. Commissioner*, 14 B. T. A. 675. Not only did the seller, the buyer and the party with whom the certificates were deposited testify that the sale was intended to be consummated on July 9th, but statements and conduct of the parties at that time and thereafter were entirely consistent with such intention. The loss on the sale was sustained in 1926." (Italics supplied.)

In *Commissioner v. Scateau*, 85 F. 2d 729, 732, *supra*, it was held:

"The respondent could be a shareholder in a corporation without ever receiving a certificate; so it would not make much difference when or if a certificate was received. See *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 233, 11 S. Ct. 984, 35 L. Ed. 702; Appeal of *Minal E. Young, etc.*, 6 B. T. A. 472, 509. Whether the taxpayer received her certificates or whether they would have been delivered to her on demand, in the calendar year 1928, is, of course, purely speculative, but it is not vital to our discussion. *The declaring corporations had done all that it was possible for them to do to transfer title to the shares to the stockholders.*" (Italics supplied.)

See to similar effect *Pacific National Bank v. Eaton*, 141 U. S. 227, 234 (1891); *In re Penfield Distilling Co.*, 131 F.

(2d) 694, 698 (C. C. A. 6th, 1942); *Kansas O. & G. Ry. v. Helvering*, 124 F. 2d 460 (C. C. A. 3rd 1941); *Matter of Friedman*, 184 Misc. 639, 641, 54 N. Y. Supp. (2) 45 (S. Ct. N. Y. Co. 1945); *First National Bank v. Englewood Mutual Loan and Building Association*, 124 N. J. Eq. 360, 1 Atl. 2d, 871 (Ch. 1938); *Mau v. Montana Pacific Oil Co.*, 16 Del. Ch. 114, 141 Atl. 828, 831 (1928); *American Jurisprudence* "Corporations", Sec. 319; Christy, *The Transfer of Stock* (1940) Sec. 11.

### **Effect of Uniform Stock Transfer Act.**

Petitioner urges that, under Section 1 of the Uniform Stock Transfer Act,\* as construed in New Jersey, title to the Hugoton stock did not pass from Panhandle to the stockholder-interveners because there was no sufficient delivery within the meaning of Section 1.

The short answer to this contention is that the Court of Errors and Appeals of New Jersey has held that the Uniform Stock Transfer Act affects only legal title and has no bearing upon equitable title—which, beyond all question, is vested, in this case, in these interveners and those similarly situated. In *Martindell v. The Fiduciary Counsel, Inc.*, 133 N. J. Eq. 408, 415, 30 Atl. 2d 281, 286 (1943), it was held:

"The Uniform Stock Transfer Law, R. S. 1937, 14:8-23, *et seq.*; N. J. S. A. 14:8-23, *et seq.*, has no

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\* The Act was adopted in New York in 1913, in New Jersey in 1916 and in Delaware in 1935 (6 Uniform Laws, Annotated, 1949 Supp., 6). See McKinney's N. Y. Pers. Prop. L. §§162-185; N. J. S. A. 14-8-23—14-8-46; Del. Rev. Code 1935 §§2048a-2048x.

Petitioner states in its brief that the intervener stockholders urged in the court below that the Uniform Stock Transfer Act was "controlling". Petitioner is in error. Intervener stockholders urged in the court below that title had passed under all possible criteria. Intervener stockholders maintain the same position in this Court.

This brief was necessarily printed after receipt of petitioner's mimeographed draft but before receipt of petitioner's printed brief. For this reason it was, unfortunately, impossible to include herein page references to petitioner's brief.

applicant to transfers of an equitable title; it governs the conveyance of the legal title only. *Stuart v. Sargent*, 283 Mass. 536, 186 N. E. 649.”\*

See also definition of “title” in Sec. 22 Uniform Stock Transfer Act, 6 Unif. Laws Annot. 25; *First National Bank v. Englewood Mutual Loan and Building Association*, 124 N. J. Eq. 360, 1 Atl. (2d) 871, 874 (Ch. 1938), *supra*; *Lask v. Bedell*, *supra*, 91 N. J. Eq. 341, 109 Atl. 849, 850; *In re Antkowski's Estate*, 286 Ill. App. 184 (1936); *Cliffs Corporation v. United States*, 103 F. (2d) 77 (C. C. A. 6, 1939); *East Coalinga Corp. v. Robinson*, 194 P. (2d) 561 (Cal. App. 1948).

### **There Was a Sufficient “Delivery” Under the Uniform Stock Transfer Act.**

However, if compliance with Section 1 of the Uniform Act were essential, delivery of the Hugoton stock by Panhandle to the United States Corporation Company—which was not Panhandle’s transfer agent as repeatedly stated in petitioner’s brief, but was Hugoton’s transfer agent (R. 32-33)—was a sufficient delivery to pass legal title under the Act. *Wills v. Investors Bankstocks Corp.*, 257 N. Y. 451 (1931); *Bayle v. First Nat. Bank*, 168 Misc. 398, 6 N. Y. Supp. (2d) 484 (S. Ct., 1937); *Meyer, Law of Stockbrokers and Stock Exchanges* (1936 Supp.) 65; *Hoffman v. Commissioner*, 71 F. (2d) 929, *supra*, this Point.

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\* The expressions contained in the opinion of Vice Chancellor Buchanan in *Besson v. Stevens*, 94 N. J. Eq. 549, quoted in petitioner’s brief, have seemingly ceased to be the law of New Jersey. The *Besson* case is not even referred to in the recent *Martindell* case, *supra*. In any event, the facts in the *Besson* case are readily distinguishable from those in the case at bar. The *Besson* case involved a purported gift of stock in a family corporation. The Vice Chancellor found that, although the controlling stockholder caused a transfer on the books of the corporation to be entered, he never lost dominion and control over the stock and had no genuine donative intent.



### **The Transfer on the Books Was Sufficient to Pass Title.**

If any act beyond the delivery by Panhandle to the United States Corporation Company of the 810,000 share Hugoton certificate was necessary to complete transfer of legal title to the Hugoton dividend, the transfer on the Hugoton stock records was such act. *Marshall v. Commissioner*, 57 F. 2d 633 (C. C. A. 6th, 1932); *Wilmington Trust Co. v. General Motors Corp.*, 51 Atl. (2d) 584 (S. Ct. 1947); *Peets v. Manhasset Civil Engineers, etc.*, 68 N. Y. Supp. (2d) 338 (S. Ct., 1946); 24 *American Jurisprudence*, Sec. 80.

In the *Marshall* case, the court held (634):

“Transfer upon the books of the corporation in itself constitutes a delivery.”

In the *Wilmington Trust* case, the owner of stock in a corporation, intending to make a gift of the stock to his brother, caused the stock to be registered in the brother's name on the corporation's stock register. A new stock certificate was issued but was never delivered to the brother. A bill in equity was brought to determine ownership to the stock. It was held that transfer on the corporation's stock register was sufficient to transfer title to the stock. Chief Justice Richards said (593):

“The general principle governing the gift of corporate stock is very clearly expressed in 24 *American Jurisprudence* 771 in the following language: ‘Generally, there is a complete gift of corporate stock where, by the direction of its owner, it has been transferred to the donee on the books of the corporation, and a new certificate issued in the name of the donee, or a certificate is issued in the first instance in the name of the donee, although the

certificate so issued is retained by the donor or the corporation, and is not delivered to the donee. . . ."

The *Peets* case was a suit for the enforcement of an agreement restricting the sale of corporate shares. Each party challenged the other's status as a stockholder. In the case of one party who claimed as a donee, it appeared that shares had been transferred to him on the books of the corporation. However, delivery of a certificate to him was not established. The Court held (68 N. Y. Supp. (2d) 338, 344):

"The transfer of the shares upon the books of the corporation clothed Ward with *legal* title. That act as stated in *Matter of Babcock*, 85 Misc. 256, 266, 147 N. Y. 168, 174 (affirmed 169 App. Div. 903, 153 N. Y. S. 1105, 216 N. Y. 117, 111 N. E. 1084), 'stands in the place of a delivery. Such an act performs precisely the office which an actual delivery would perform if it were a chattel.'" (Italics supplied.)

In the case of *In re Robert's Appeal*, 85 Pa. St. 84 (1877), the following appears:

"\* \* \* transferring the shares to her upon the books of the Company is putting her in complete possession of the thing assigned, and clothing her with the complete legal title. It stands in the place of a delivery. Such an act performs precisely the office which an actual delivery would perform, if it were a chattel. It is as complete a delivery as the nature of the thing will admit of. There can be no clearer evidence of a design to part with the right of property in favor of another than an absolute transfer of the *legal* title to her for her own use. \* \* \* The best evidence of her ownership is the transfer on the books of the Company. The certificates were but secondary evidence of her ownership, and only useful for purposes of transfer." (Italics supplied.)

See also Christy, *The Transfer of Stock* (2nd Ed., 1940), Section 54.

Under all the above authorities it is clear that full title to the Hugoton shares has, since October 29, been vested, not in Panhandle, but in the stockholder-interveners and those similarly situated. It was therefore unrealistic for petitioner to request the District Court to order Panhandle not to transfer, and to cause Hugoton not to transfer, title to the Hugoton shares to Panhandle's stockholders. The request was very properly denied.

## POINT II.

**Enjoining delivery to the Hugoton stockholders of the certificates evidencing ownership of their shares would inflict serious hardship on the Hugoton stockholders.**

Some measure of the damage which would be caused by the issuance of an injunction in this case can be seen from the paralyzing effect of the District Court's restraining order and the stays on appeal. These restraints have compelled the Hugoton stockholders to stand still at their jeopardy while a Federal administrative agency seeks to extend its jurisdiction into an area from which it would appear to be specifically proscribed by statute. Among the results, present and prospective, of the existing situation are the following:

(1) Even though a person is the owner of the Hugoton stock, he cannot exercise one of the most important attributes of ownership. He cannot sell his stock for cash. All he can do is sell his stock on the over-the-counter market and receive a promise to pay for the stock when issued. When stock is sold on the New York Stock Exchange (and

the same is the case in over-the-counter transactions) the universal rule is that payment is required on the third full business day after the sale has been made. Should a person desire to sell his Hugoton stock, all he can receive is a contract to purchase, which, if the restraint is continued, does not have to be paid for until some indefinite time in the future. If there is a lengthy hearing before the Federal Power Commission and the Commission takes the case under advisement for a considerable period before rendering its decision, and the period be further prolonged by an appeal, it may be years before the seller receives payment. Instead of carrying the normal three-day risk on the solvency of the purchaser, the sellers will have to carry the risk indefinitely.

Petitioner in its brief contends that this hardship is "more fanciful than real". It claims (1) that "marking to the market" eliminates risk to the seller and (2) that the seller can obtain ready cash by assigning his over-the-counter contract to sell his Hugoton stock. As a practical matter, however, "marking to the market" only affords a degree of mitigation of the risk on the seller. And as long as the Hugoton dividend is involved in litigation no cash can be raised by assignment of contracts to sell Hugoton stock—as must be perfectly apparent to anyone familiar with securities transactions.

(2) If the requested injunction against delivery of the certificates should be granted, the rank and file of Hugoton stockholders will be strongly inclined to dispose of their shares, as a great many have already done (R. 26, 27, 63). Stock unrepresented by certificates is unattractive, for many reasons, to the average small investor. By the same token, this is a situation made-to-order for speculators, willing to do without certificates for a time, if the stock

itself can be purchased at a bargain. Accordingly, granting the injunction against delivery of the certificates would be most likely to enrich such speculators at the expense of the small Hugoton stockholders.

(3) When the Panhandle stock went ex-dividend on October 29, its price on the New York Stock Exchange immediately declined by approximately \$5.00, thus reflecting the value of the Hugoton dividend as severed from the Panhandle assets—a fact of which this Court may take judicial notice. Panhandle stockholders who sold on the ex-dividend date and subsequently, were willing to accept the reduced price on the assumption that they would receive their Hugoton certificates on or about November 17. While their Hugoton certificates are withheld from them, this class of investors is in the dark tax-wise, as well as financially. For example: A Panhandle stockholder who purchased his stock at 65 and sold it ex-dividend at 60 on October 29, does not know whether he has sustained only a capital loss of \$5.00 for each share of Panhandle which he sold, or whether he has also received ordinary income in the form of Hugoton stock.\*

(4) It seems possible too that the Commissioner of Internal Revenue will seek to include the Hugoton dividend in the gross estate of any Panhandle stockholder dying after October 29, although, lacking the certificates, the estate cannot sell or pledge the stock for ready cash with which to pay the tax. *Helvering v. McGiluc's Estate*, 119 F. 2d 167 (C. C. A. 4th, 1941).

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\* Of course, the effect of all of the ex-dividend trading has been thrown into doubt as a result of the stays that have been issued, and inevitably confusion must exist in the stock market as to whether purchases of Panhandle include the Hugoton values or not.



(5) The crippling effect of the restraint of this dividend payment has spread to another quarter. Since the Hugoton stock was ~~issued~~ to Panhandle it has been freely bought and sold on the "over-the-counter" market. The Hugoton stock—unlike the "when, as and if issued" securities well known in railroad reorganizations—had been *issued* to Panhandle, so the only contingency in the minds of persons purchasing Hugoton before the Commission sought restraint of the transaction was the slight delay until the issued stock would be delivered on or about November 17. Under the New York Stock Exchange rules (Rule 550(d) 3a and 3b) such purchases are treated as margin transactions and 25% of the purchase price must be put up with a broker. In addition, the margin must be "marked to the market", which means that in the event of a price decline the purchaser has to put up additional collateral. Under New York law, such Hugoton purchasers are also liable for brokers' commissions whether or not the stock is ever delivered to them. *Sices v. Ungerleider*, 142 Misc. 402, 255 N. Y. Supp. 314 (App. Term, 1st Dept., 1931). A large amount of money is thus captured in brokers' accounts—not bearing interest. If an injunction is granted herein, it may be several years before these balances are released.\*

Such illustrations of the hardships which would result from enjoining delivery of the Hugoton certificates might be expanded considerably. It is clear, however, on the basis of those set forth above, that the Hugoton stockholders will be exposed to severe financial loss and serious inconvenience, if the delivery of their certificates should be enjoined.

\* In a footnote to its brief, petitioner suggests that purchasers of Hugoton stock have recognized that the requested injunction would not infringe any rights on their part. This is not so. A purchaser of 10,000 shares has registered vigorous opposition to the requested injunction. (R. 45).

In view of the well-established and authoritative interpretation previously given to the Natural Gas Act, which is contrary to the present claim of the Federal Power Commission, it is submitted that a wiser exercise of discretion would have led the Commission to choose for its test case one in which no such large and fluctuating values were at stake pending the determination of the proceeding.

### POINT III.

**The Commission's dilatory tactics alone are responsible for the fact that the injunction requested by it cannot be granted without irreparable injury to the rights of the Hugoton stockholders.**

The petitioner in its brief contends that Panhandle is to blame for any hardships suffered by these interveners and those similarly situated.

This attempt to place the blame for the predicament of the Hugoton stockholders upon Panhandle will not stand analysis.

While the Commission issued an order on October 26, that order not only did not command Panhandle to hold up the payment of the Hugoton dividend but did not even request that Panhandle do so. The order announced only that the Commission intended to investigate "the facts and circumstances involved in the formation and proposed operation of the Hugoton Production Company and the transfer to said Company by Panhandle Eastern of the natural-gas reserves referred to above" (R. 11).

It may well be that if the Commission had issued a restraining order on October 26, Panhandle might have hesitated to continue with payment of the dividend. How-

ever, for it to have stopped the dividend on the strength of a mere investigatory order would have been inconceivable from a business point of view. Moreover, it would have been an invasion of the rights of the Panhandle stockholders and would most likely have precipitated suits against Panhandle on the part of its stockholders.

Petitioner in its brief urges that Panhandle "proceeded at its own risk" in going forward with the dividend distribution. It would have been exposing itself to greater risk in *not* so proceeding.

There is thus no substance whatever to petitioner's contention upon its brief that the hardships confronting these interveners and those similarly situated "are the consequence of Panhandle's private determination of law after due notice of the Commission's order of October 26, 1948...."

On the contrary, it is apparent that *petitioner* is solely responsible for the involvement of the rights of these interveners and those similarly situated in this controversy between petitioner and Panhandle.

Petitioner was verbally informed of the proposed Hugoton dividend transaction on or about October 11 (R. 28). The proposed transaction also received wide publicity in the press (*id.*). For no apparent reason, however, petitioner failed until November 10, even to request Panhandle to delay the transaction, and in that interim of almost an entire month, as shown above, extremely valuable rights vested in Panhandle's stockholders.

The only excuse advanced by petitioner for its failure to take timely steps to stay the Hugoton dividend transaction before private rights became vested is that an investigation was necessary.

But the investigation was not even ordered until October 26, 15 days after the Commission was advised of the transaction. And, so far as appears, the actual investigation of Panhandle's files and the questioning of its officers required only *three days* (R. 36-37, 38). This is not at all surprising, since Panhandle is under the continuous supervision of petitioner and the facts allegedly uncovered by the investigation to support petitioner's jurisdictional theories must certainly have been in petitioner's files long before the Hugoton dividend transaction was initiated.

Making all due allowance for time required by the investigation and for consultation and decision within the Commission, petitioner, had it acted with reasonable despatch, might easily have instituted this suit while the Hugoton stock was still the property of Panhandle instead of the property of these interveners and those similarly situated, i. e., prior to October 29.\*

Unquestionably, petitioner stands entirely responsible for the existing situation, which, as shown under Point II, has already caused much hardship to these interveners and others, and which would be greatly aggravated if petitioner should be granted the injunction.

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\* As indicating that Federal administrative agencies can act with despatch in this type of situation, see *Securities and Exchange Commission v. Long Island Lighting Co.*, 148 F. 2d 252 (C. C. A. 2nd 1945). There the SEC learned *through the press* that the Lighting Company was undertaking a recapitalization. On the *next day*, the SEC was before the New York Federal District Court with an application to restrain the recapitalization.

**CONCLUSION.**

The decision below should be affirmed.

Dated: April 19, 1949.

Respectfully submitted,

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